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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph M. Morrissey*
Robert T. Murphy
WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 822-6900

Counsel for Petitioner
Multi-State Communications, Inc.

**Counsel of Record*

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QUESTIONS PRESENTED

The Court of Appeals affirmed the action of the respondent, Federal Communications Commission (the "Commission' or "FCC") which, under newly enacted Section 331 of the Communications Act, (1) reallocated television Channel 9 from New York to New Jersey and granted a five-year license to RKO General, Inc. (RKO) without a comparative hearing and (2) summarily dismissed as moot Multi-State's competing application for Channel 9 thus abruptly terminating without hearing its application pending since 1972, and vigorously pursued on all levels since that time. Affirmance was based on what the Court conceived to be its duty to read and apply the statute in conformity with what it believed to be its legislative intent although the terms of the statute were plain and unambiguous and a straightforward reading of it, in our view, did not authorize the reallocation of Channel 9 to New Jersey.

Further, the court below held that newly enacted Section 331 of the Communications Act made one limited exception to the comparative hearing requirement of Section 309 as mandated by this Court in *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945), and, consequently, Multi-State's right initiated in 1972 to conclude normal hearing procedures required by *Ashbacker* was made moot.

The following questions are presented:

1. Whether the decision below by elevating perceived legislative intent over the plain, unambiguous terms of the statute constitutes judicial legislation and transcends the judicial function in conflict with controlling decisions of this Court.

2. Whether, contrary to the conclusion of the Court below, a competing applicant for a television channel which has filed and pursued its application under Section 309 of the Act for 12 years on all administrative and judicial levels has not thereby acquired a right to due process protection of the Fifth Amendment.

Succinctly, should new legislation, *or the interpretation thereof,* provide a safety net for the wrongdoer and thus seriously offend public policy? Should new legislation, *or the interpretation thereof,* be permitted to provide such a refuge and destroy the pre-existing and unrelated rights of another and thus seriously violate basic constitutional guarantees?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Multi-State Communications, Inc., petitions for a writ of certorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A)[1] is reported at 728 F.2d 1519. The decision and orders of the Commission are reported at 53 RR 2d 469 and 53 RR 2d 671 (1983). (App. B)

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[1]Citations to "App." refer to appendices to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1984. A timely petition for rehearing and suggestion for rehearing en banc were denied on May 7, 1984. (App. C). The jurisdiction of the Court is invoked under 47 U.S.C. Sec. 402(j) and 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Constitution, statutory provisions and administrative regulations are set forth in Appendix D.

STATEMENT

Background

RKO General, Inc. (intervenor below and RKO hereinafter) is a wholly owned subsidiary of General Tire and Rubber Co. and for many years was the licensee of television Channel 9 in New York City (WOR-TV) as well as additional TV channels in Los Angeles (KHJ-TV) and Boston (WNAC-TV).

On May 1, 1972, Multi-State[2] filed a competing application for Channel 9 in New York contesting the license renewal application which had been filed by RKO.

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[2]Multi-State Communications, Inc., is a New York corporation comprised of some 55 citizens of New Jersey, New York and Connecticut. Since 1972, it has invested approximately one million dollars and thousands of hours of effort in support of its competing application for Channel 9 and has persisted in the pursuit of its application through round after round of administrative and judicial proceedings in the intervening years.

Thereafter there ensued a series of prolonged, complicated proceedings which are not necessary to detail for purposes of this petition. Eventually they led to the disqualification of RKO as a broadcast licensee in Boston, Los Angeles and New York. *RKO General, Inc.*, 78 FCC 2d 1-357, 47 RR 2d 921 (1980). The applications for the latter two stations had been conditioned by the FCC upon the outcome of the Boston renewal application.

The reasons for this decision centered upon RKO's anti-competitive reciprocal trade practices, the filing of false financial statements with the FCC and, importantly, the blatant lack of candor in dealings with the Commission by its parent General Tire as well as RKO.

On appeal, the Court of Appeals sustained the Commission's rejection of the Boston renewal application but remanded for a "principled explanation for RKO's disqualification as a licensee" of the Los Angeles and New York stations. *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. den.*, 456 U.S. 927 (1982), holding, in effect, that the Commission could not automatically deny renewal in Los Angeles and New York because the reason for the conditioning of the latter two proceedings on the Boston proceeding did not comport with the ground on which the Court found RKO disqualified in the Boston proceeding.[3] Referring to the tangled web of misconduct and concealment by RKO and its parent, General Tire and

[3]"The FCC could not have known when it conditioned either of these proceedings as it did that the Boston outcome would turn on a lack of candor issue that had not even been designated in the Boston proceeding. RKO's misconduct did not occur directly before the trier of the fact in either the Los Angeles or New York City proceedings. Accordingly, these decisions must be remanded to the Commission for further consideration as it deems appropriate." 670 F.2d at 236.

Rubber Co.,[4] disclosed in the litigation as a "sorry chapter in the history of American communications law," the Court emphasized that its finding of egregious lack of candor" in the Boston proceeding is *res judicata* . . . and is not subject to collateral attack in these subsequent proceedings" and noted that "it may well be that such a finding is inconsistent with a licensee holding a license anywhere although that decision is for the Commission in the first instance." 670 F.2d at 237.

Despite the admonition of the Court of Appeals to expedite the remand proceeding – ("The need for a remand and further action by the Commission is discomforting in a fifteen year old case . . . We admonish all parties to get on with the task") the Commission failed to take further steps until the passage of legislation in 1982 which added new Section 331 to the Communications Act.

Tacked on the Tax Equity and Fiscal Responsibility Act of 1982 as an obvious non-germane amendment, the new Section 331 of the Communications Act of 1934,[5] entitled Very High Frequency Stations, was passed on August 19, 1982, and was signed into law on September 3, 1982. It reads as follows:

> "It shall be the policy of the Federal Communications Commission to allocate channels for

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[4]The Court, after noting that RKO is a wholly owned subsidiary of General Tire & Rubber Company and that the Commission has concluded tht the two companies were operated as a single integrated company, firmly states: "General Tire, by its own admission, has engaged in a staggering variety of corporate misconduct." 670 F.2d at 218.

[5]47 U.S.C. Sec. 331 (1982).

> very high frequency commercial television broadcaseting in a manner which insures that not less than one channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocatd no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of the Communications Act of 1934."

Because the proposed new Section 331 of the Communications Act of 1934 was introduced as a last minute "rider" to the Tax Equity and Fiscal Responsibility Act of 1982, it escaped the processing through the normal legislative channels which customarily is required for such a substantive amendment to a major federal statute. Consequently, scrutiny and reasoned consideration by the appropriate Committees having expertise in federal communications matters was avoided. There were neither hearings nor floor discussion or debate on this unusual amendment. Perfunctory statements of its sponsor, Senator Bradley, and a relatively cursory reference to it in the report of the Conference Committee on the Tax Equity and Fiscal Responsibility Act of 1982 are all that can be mustered as scanty legislative history.

A very high frequency commercial television broadcast channel (Channel 13) had been allocated to the State of New Jersey for many years and was so designated in the

Commission's Table of Assignments[6] at the time of enactment of the statute, *supra*.

In 1961, the Commission approved the transfer of the license of Channel 13 from NTA Television Corporation to Educational Television for the Metropolitan Area (ETMA) and authorized the location of its main studio in New York City[7] on condition that fully adequate studio facilities be maintained at Newark, New Jersey, at all times. ETMA proposed the use of this commercial channel essentially for non-commercial educational purposes.[8]

The channel was never reallocated as stressed by the Commission in its Order (44 FCC 2563, at 2567, 2573) and from that day to the present, it has remained a commercial VHF channel allocated to Newark, New Jersey.

Four days following the enactment of Section 331, on September 7, 1982, RKO notified the Commission that it agreed to the terms of Section 331 and stated that it would relocate its main studio to Secaucus, New Jersey,[9] upon issuance of a license for a term of five years. However, its transmitter would remain atop the World Trade Center in New York. Thus, RKO proposed to use the identical trans-

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[6]For years the table of television allocations were technically denominated "Table of Assignments" 47 C.F.R. Sec. 73606; Sixth Report and Order, 41 FCC 148 (1952) (Television Assignments). More current reference is Table of Television Channel Allotments, 83 FCC 2d 51 n.1 (1980). Hence, the terms "Assignments"and "Allotments" are synonymous and so understood in the trade and Commission practice. (See App. D.)

[7]*NTA Television Broadcasting Corp.*, 44 FCC 2563 (1961).

[8]"There is no requirement that a commercial channel be employed soley for commercial purposes." *NTA Television Broadcasting Corp., supra*, at 2564.

[9]Secaucus is a community of approximately 13,000. The FCC Mass Media Bureau had recommended any such reallocation of Channel 9 should be to Newark, the principal city of New Jersey.

mitter site it used as a New York station and to broadcast to the identical area it served for many years as a New York licensee. In essence, its proposed transmutation from a New York station to a New Jersey station is obviously a cosmetic one wholly designed to overcome the adverse findings of Commission and Court as to RKO's qualifications to continue as a broadcast licensee.

Wthout further hearings, the Commission subsequently granted RKO's "request" for reallocation of Channel 9 to Secaucus and granted a license for a term of five years by Order adopted December 8, 1982, and released March 11, 1983 (App. B, p. 19a).

By separate Order adopted December 8, 1982, and released March 29, 1983 (App. B, p. 39a), the Commission dismissed as moot the competing application of Multi-State which was then pending for hearing in accordance with the remand order of the Court of Appeals.

The Commission held that its actions in granting the reallocation of Channel 9 to Secaucus and its dismissal of the ten-year-old competing application of Multi-State were mandated by new Section 331 of the Communications Act of 1934.

However, three of the members of the Commission expressed serious concern as to the constitutional validity of the abrupt termination of Multi-State's comparative hearing rights (App. B, pp. 31a-34a)

While "reluctantnly acced(ing)" to RKO's move and relicensing and to the termination of Multi-State's comparative hearing rights, Commissioners Fogarty and Rivera candidly noted "We are nonetheless deeply troubled by the prospect that our actions here violate Multi-State's due process rights. The essential question, it seems to us, is

whether extinguishing the WOR-TV comparative renewal proceeding impermissibly deprives Multi-State of its Section 309 comparative hearing rights and, thus, of due process of law." (App. B, p. 34a).

Commissioner Anne P. Jones in a separate statement (App. B, p. 30a), expressed doubt as to the action of the Commission in dismissing as moot the competing application of Multi-State, referring to the Commission's order as ". . . very problematical insofar as it moots Multi-State's competing application. . . ."

The Court of Appeals, on March 6, 1984, affirmed the orders of the Commission. 728 F.2d 1519 (D.C. Cir. 1984). In substance, the Court below held that it was necessary to resort to legislative history to understand the purpose of Section 331 (although its terms were plain and unambiguous) and that its intent was to furnish an "operating" VHF commercial television station to New Jersey notwithstanding the fact that a VHF commercial channel already was allocated to it. Further, the Court below concluded that Multi-State had no constitutional protection against the divestment of its license application without a hearing.

REASONS FOR GRANTING THE WRIT

The grant of certiorari is warranted because of the importance of the question of federal statutory construction and the length to which agencies or courts may depart from the clear and unambiguous terms of a statute to effect what is believed to be the intent of the legislature.

Moreover, and importantly, a significant issue of administrative law is posed by the summary dismissal without further legal process of Multi-State's competing appli-

cation for Channel 9 which has been pursued since 1972 at substantial expense. Such action contravenes the ordinary due process requirements laid down in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327, 66 S.Ct. 148 (1945). This Court has referred to such full hearing requirements as "essential for wise and just application of the authority of administrative boards and agencies." *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 202, 76 S.Ct. 763, 767 (1956). Such hearing rights are "rights of substance." *Kessler* v. *FCC,* 326 F.2d 673 (D.C. Cir. 1963).

Because of the premier role assigned to the District of Columbia Circuit in the review of FCC decisions, this case warrants the exercise of the over-view or supervisory authority of this Court in preserving the integrity of the administrative process.

I. THE DECISION BELOW REPRESENTS JUDICIAL LEGISLATION AND CONTRAVENES DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS.

The plain, unequivocal language of the statute seeks to provide for reallocation of a VHF channel "to a community within a *State in which there is allocated no very high frequency commercial television broadcast channel"* under a policy "which ensures that not less than one such channel shall be allocated to each State."

The action of the Commission in reallocating Channel 9 from New York City to Secaucus, New Jersey, in reliance upon the provisions of Section 331 was clearly at variance with the statute's plain language since a "very high frequency commercial television broadcast channel" had already been allocated to New Jersey and was plainly carried as such in the television allocation table of the Commission's rules. C.F.R. Sec. 73.606(b). The Commission con-

ceded this fact stating, in pertinent part, in ft. n. 2, of its Report and Order (App. B, p. 21a)

"An examination of the television allocation table (73.606(b) of the Commission's rules) shows that Channel 13, a non-reserved[10] *VHF television channel is allocated to New Jersey."* (Emphasis ours).

In a labored effort to qualify this key admission and to cover its deviation from the express terms of new Section 331, the Commission noted that Channel 13 has been used for a non-commercial purpose and that "RKO's application would represent the first provision of commercial VHF television to New Jersey and would conform to the explicit Congressional intent to facilitate such service to the State of New Jersey. That is not what is stated in new Section 331 either explicitly or implicitly.

What the Commission – and the Court below – has totally ignored is the statute's plain statement of policy for FCC guidance which speaks only to the *allocation* of VHF commercial television channels and is expressive of nothing else. A statutory statement of policy, of course, is declarative of legislative intent and is a most reliable indicator of the legislative mind.

It can not be questioned that the fact that Channel 13 was engaged in non-commercial programming did not affect its status as a *commercial* station, as conceded by the Commission in this case.[11] Importantly, the statute is ad-

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[10]Non-reserved means "commercial."

[11]More than thirty years ago, in *Lufkin Amusement Company,* 8 RR 666 (1952), the Commission emphasized that:

> "The unreserved (commercial) channels may be used commercially as the licensee sees fit." (p. 668). See also, *NTA Television Broadcasting Corp.,* 44 FCC 2563 (1961).

dressed not to the *initiation* of a first commercial VHF service but plainly and exclusively to *allocation* of Very High Frequency television stations. The declared policy which is sought to be imposed upon the Commission is "to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible.

Reallocation of such a channel can only be made "to a community within a State *in which there is allocated no very high frequency commercial television broadcast channel. . . .*" (Emphasis ours).

The lawful justifiction for reallocation is readily apparent on the face of the statute itself; reallocation can only be made to a community in a State which has no very high frquency commercial television broadcast channel allocated to it.

Obviously, therefore, the reallocation of Channel 9 to Secaucus, New Jersey, is patently at odds with the plain, non-complicated terms of Section 331. For this apparent reason, the Commission was constrained to resort to a construction of the statute's intent — a construction designed to support and justify its mistaken action.

The Commission's unjustified action has been condoned and erronesouly approved by the Court of Appeals.

The grant of RKO's request for reallocating Channel 9 from New York to New Jersey led the Commission to conclude that, as a consequence of such reallocation, the competing application of Multi-State was moot. Hence, in a separate order, adopted December 8, 1982, and released March 28, 1983 (App. B, p. 39a), the Commission dismissed as moot the competing application for Channel 9 which

Multi-State had filed on May 1, 1972, and which it had vigorously pursued ever since.

The Commission's summary dismissal of Multi-State's competing application for Channel 9 without further legal process has likewise been erroneously affirmed by the Court of Appeals.

The conduct of Commission and Court in resorting to a construction of legislative intent in order to overcome the full force and effect of the plain language of the statute itself is a departure from governing norms of statutory construction, since resort to legislative history is not justified when a statute is clear and unequivocal on its face. *United States* v. *Oregon,* 366, U.S. 643, 81 S.Ct. 1278 (1961); *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed. 117 (1978); *Rubin* v. *U.S.,* 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed. 2d 633 (1981); *Howe* v. *Smith,* 452 U.S. 473, 101 S.Ct. 2468, 69 L.Ed. 2d 171 (1981).

As one court has put it: "Ordinarily, where the language of a statute is clear and unambiguous on its face, the thrust of the language should not be controverted by seeking to show an inconsistent legislative intent." *Sea- Land Service, Inc.* v. *Federal Maritime Commission,* 404 F.2d 824 at 828 (D.C. Cir. 1968).

In *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U.S. 485, 67 S.Ct. 789, 91 L.Ed. 1040 (1947), the court cogently underscored that: "It is for Congress not for us to create exceptions or qualifications at odds with its [the Act] plain terms." 67 S.Ct. at 792.

There is no confusion or ambiguity between the terms "allocated" or "assigned" as posited by the Court below as giving rise to a need for resorting to lengthy legislative

history (728 F.2d 1522-1524).[12] Certainly, the Commission entertained no doubt that Channel 13, a commercial VHF television channel was *"allocated* to New Jersey" at the very time the statute was enacted as clearly set forth in footnote 2 of its Report and Order. (app. B, p. 21a). The statute, it will be noted, speaks to *allocations* of a VHF television channel and not to its use for either a commercial or non-commercial purpose. Yet, both Commission and Court resorted to a construction of the statute so as to import within its terms a requirement that "an *operating* VHF commercial television station" was mandated. In this manner, the statute was elarged – its terms varied. Thus, the clear and precise test for determining whether *reallocation* conformed with its terms was substantially changed.

The statutory test, whether the State to which the licensee seeks reallocation is one "in which there is allocated no very high frequency commercial television broadcast channel" is transformed by adding the qualifying term "operating" so as to modify and radically alter the statutory test.

There can be no serious question that a straightforward reading of Section 331 simply does not permit the reallocation of Channel 9 to New Jersey – a State to which a very high frequency commercial television broadcast channel was already allocated as candidly conceded by the Commission.

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[12]"We are . . . bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that, where no ambiguity exists, there is no room for construction. Inconvenience of hardships, if any, that result from following the statute as written must be relieved by legislation . . . *Construction may not be substituted for legislation." United States* v. *Missouri Pac. R.R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136 (1929). (Underscoring ours).

Rewrite of a statute is not the province of a Court or an administrative body irrespective of what they may conceive to be its legislative intent. *Iselin* v. *United States,* 270 U.S. 245, 46 S.Ct. 248 (1926). There, Justice Brandeis, writing for the Court, in unqualified terms, stated:

> "What the government asks is not a construction of statute but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function.*" 270 U.S. at 251, 46 S.Ct. at 250. (Emphasis supplied).

As Justice Frankfurter once reflected wisely: "An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied, however much later wisdom may recommend the inclusion." *Frankfurter, Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 534 (1943).

The point is not whether a statute differently worded would result in better executing legislative intent since, as Mr. Justice Cardozo (for the Court) put it in *Anderson* v. *Wilson,* 289 U.S. 20, 53 S.Ct. 417 (1933): "We take the statute as we find it." *Id.* at 27.

As Mr. Justice Holmes once noted: "We do not inquire what the legislature meant; we ask only what the statute means." *Holmes, Collected Legal Papers,* 207.

In the very earliest days of Supreme Court history, Chief Justice Marshall, in *United States* v. *Wiltberger,* 5 Wheat (18 U.S.) 76, 95-96, 5 L.Ed. 37 (1820) wrote:

> "The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

The danger in resorting to legislative history when, as here, a statute is not "inescapably ambiguous," is touched upon forcefully by Mr. Justice Jackson in a concurring opinion in *United States* v. *Public Utility Comm. of California,* 345 U.S. 295, 73 S.Ct. 706 (1953), wherein it is suggested that in certain circumstances such a process leads not to an "interpretation of a statute but creation of a statute." *Id.* at 719-720. A comparable view was expressed by Chief Justice Vinson in *Ex Parte Collett,* 337 U.S. 55, 69 S.Ct. 944 (1949).

We need not emphasize that remarks of legislators or reports of committees, however instructive or interesting, are not governing law. Only the statute itself is enacted by the Congress and signed by the President and hence becomes a binding law.

The rule of *Iselin, supra,* has found general and continued application by this Court and lower Courts.

United States v. *Missouri Pac. R.R. Co.,* 278 U.S. 269, 49 S.Ct. 133, 73 L.Ed. 322 (1929); *Hanover Bank* v. *C.I.R.,* 369 U.S. 672, 82 S.Ct. 1080, 8 L.Ed. 2d 187 (1962); *Wallace* v. *Cutten,* 298 U.S. 229, 56 S.Ct. 753, 80 L.Ed. 157 (1936); *Toilet Goods Assoc.* v. *Fnch,* 419 F.2d 21 (2d Cir. 1969); *Manufacturers Hanover Trust Co.* v. *C.I.R.,* 431 F.2d 664 (2d Cir. 1970); *American Standard, Inc.* v. *Crane Co.,* 510 F.2d 1043 (2d Cir. 1974); *Tracy Leigh Dev. Corp.* v. *Government of Virgin Islands,* 501 F.2d 439 (3rd Cir. 1974); *Busey* v. *Deshler Hotel Co.,* 130 F.2d 187 (6th Cir. 1942); *United States* v. *W.T. Rawleigh Co.,* 267 F.2d 180 (7th Cir. 1959); *Bosse* v. *C.I.R.,* 479 F.2d 1147 (7th Cir. 1973); *Fisher Flouring Mills Company* v. *United States,* 270 F.2d 27 (9th Cir. 1959); *Heater* v. *F.T.C.,* 503 F.2d 321 (9th Cir. 1974); *In Re Shear,* 139 F.Supp. 217 (D.C.N.D. Cal. 1956); *United States* v. *One*

Ford Sedan, 164 F.Supp. 729 (D.C. Md. 1958); *Associated Telephone & Tel. Co.* v. *United States,* 199 F.Supp. 452 (D.C.S.D. N.Y. 1961); *National Petroleum Refiners Assoc.* v. *F.T.C.,* 340 F.Supp. 1343 (D.C.D.C. 1972).

As the Court below, in another case, so definitively expressed the governing canon here involved: ". . . although a court should interpret the meaning of statutory language in light of the intent of its drafters, we cannot rewrite the statute to compensate for unforseen circumstances. That power belongs to the legislature alone." *Joseph* v. *U.S. Civil Service Commission,* 554 F.2d 1140 at 1155. (D.C. Cir. 1977).

It would appear self evident that the Court below has trespassed beyond the limits of statutory interpretation and has engaged in enlargement of the statute to accommodate what it perceived to be the intent of the statute's putative author. This, in our view, is a serious departure from the governing rule of law, and, if left unchecked, will constitute a misleading precedent particularly in the field of administrative law.

The relevant issue is not whether the construction placed upon the statute by the Court below better accords with the intent of its author. Rather, the question is whether the reading which the agency and the Court has favored is that which the Congress "effectuated by its enactment of [the] statute." *Badaracco* v. *C.I.R.,* ____ U.S. ____, 104 S.Ct. 756 (1984). In that case, this Court has recently reaffirmed:

> "Court's are not authorized to rewrite a statute becaues they might deem its effects susceptible of improvement." (Citing *T.V.A.* v. *Hill,* 437 U.S. 153, 194-195, 98 S.Ct. 2279, 2301-2302, 57 L.Ed.2d 117 (1978)).

II. THE DECISION BELOW IMPERMISSIBLY DENIES THE PROTECTION OF THE DUE PROCESS REQUIREMENT OF THE FIFTH AMENDMENT TO MULTI-STATE BY AFFIRMING THE COMMISSION'S SUMMARY DISMISSAL OF ITS SECTION 309 APPLICATION WHICH HAD BEEN PURSUED FOR MORE THAN A DECADE.

Due Process

Section 309 of the Communications Act (47 U.S.C. Sec. 309) as construed in this Court's landmark decision in *Ashbacker Radio Corp.* v. *FCC,* 326 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945), mandates a full comparative hearing in every case involving mutually exclusive applicants for a broadcasting license.

Moreover, in license renewal cases, "the FCC is required to make an affirmative finding that the public interest will be served by granting the license." *West Coast Media, Inc.* v. *FCC,* 695 F.2d 617 at 622 (D.C. Cir. 1982).

In the opinion of the court below, however, both of these fundamental and historical requirements of the Act are made "moot" in the limited context of recently added Section 331 (728 F.2d at 1525). Although Section 331, on its face, does not purport to amend Section 309 of the Act, the Court of Appeals seemingly found that it served to overcome the comparative hearing requirement in connection with this one case.

It is imperative, therefore, that the destructive impact of Section 331 upon the long-pending application of Multi-State be examined in constitutional terms. A central issue is whether a Section 309 television application litigated and pursued for more than a decade has evolved into a

species of property entitled to the due process protection of the Fifth Amendment.[13]

The right to a hearing on an application which presents a valid basis, as here, and which has been vigorously pressed for more than a decade is a species of property entitled to constitutional recognition and protection.[14] It cannot be denied that Multi-State has expended substantial resources in pursuing its Channel 9 application. This fact must not be ignored and certainly enters into any fair appraisal of its case.

It is fair to say that Multi-State's antecedent right to a full and fair hearing in completion of that which began in 1972 has every indicia of a protected property interest. Although originally derived from Section 309 of the Act, that right fully exercised over a period of many years thereby became rooted in the Constitution. This right merits due process protection as much as welfare benefits. (*Goldberg* v. *Kelly,* 397 U.S. 254 90 S.Ct. 1101 (1970), a horse trainer's license (*Barry* v. *Barchi,* 443 U.S. 55, 99 S.Ct. 2642 (1979)), a high school education (*Goss* v. *Lopez,* 419 U.S. 565, 95 S.Ct. 729 (1975)), a cause of ac-

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[13]For example, the Commissionn recognized that a competing application achieves a value so that incumbent licensees are permitted to settle out the competing claim with Commission approval. Prior to 1982, compensation was limited to expenses incurred by the withdrawing applicant. The Commission approved payment of almost three quarters of a million dollars by an incumbent to a withdrawing challenger in *Hampton Roads Television Corp.,* 46 RR 2d 1547 (1980).

[14]The Commission, as early as 1943, alluded to Section 309 as granting an absolute hearing right. *Hearing on S.814, Senate Committee on Interstate Commerce,* 78th Cong. 1st Sess. 942 (1943). Cf, *United States* v. *Storer Bdc. Co.,* 351 U.S. 192 (1956). We do not suggest, of course, that an evidentiary hearing is required when no valid purpose can be served thereby.

tion (*Mullane* v. *Central Hanover Bank,* 339 U.S. 306, 70 S.Ct. 652 (1950)), or the use of a state's Fair Employment Practices Commission's adjudicatory procedures (*Logan* v. *Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148 (1982).

Given Multi-State's pursuit of its application in the renewal proceeding which was pressed at substantial expense for more than a decade and which spanned all levels of administrative and judicial processes, it is evident that the full hearing right conferred by Section 309 of the Act ripened into a species of property entitled to the *full protection* of the Due Process Clause of the Constitution. In this respect it may properly be said in the words of a current, well-known television ad – "They earned it." *Logan* v. *Zimmerman Brush Co., supra; Mullane* v. *Central Hanover Bank & Trust Co., supra.*

The right to due process "is conferred, not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . it may not constitutionally authorize the deprivation of such an interest once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Arnett* v. *Kennedy,* 416 U.S. 134, 164-167, 94 S.Ct. 1633, 1650-1651 (1974), per Powell, Jr. See also, *Vitek* v. *Jones,* 455 U.S. 480, 100 S.Ct. 1254 (1980).

The power of Congress to alter or carefully limit rights conferred by statute, in certain circumstances is to be recognized. But the total destruction or elimination of such a right without due process as was accomplished in this case, does not fall within the ambit of such author-

ities.[15] As noted in *Logan, supra,* the government "may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." 455 U.S. at 434, 102 S.Ct. at 1157.

The Court of Appeals holds erroneously that the statutory phrase "notwithstanding any other provision of law" disposes of this material issue. There is, however, no sound authority to support the conclusion that such verbiage can cancel the due process protections attending an antecedent right which is grounded in the Constitution of the United States, such as that of Multi-State. The Constitution of the United States cannot be abrogated in such a fashion.

Additionally, the court below erred in approving the retroactive application of Section 331 so as to moot Multi-State's long litigated application. This was a matter of serious concern to Commissioners Fogarty and Rivera, as we have earlier noted.

It is fundamental that a statute, to be construed retrospectively, must clearly provide for and permit retrospective application by its own terms. *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 34 S.Ct. 101, 58 L.Ed. 179; *Greene* v. *United States,* 376 U.S. 149, 84 S.Ct. 615, 11 L.Ed. 2d 516 (1964). Importantly, a clear intendment of retrospective application must be plainly in-

[15]The decision below, concludes, without persuasive authority that Congress by Section 331 made moot the hearing procedures construed in *Ashbacker.* 728 F.2d at 1525. Section 331, of course, does not deal at all with this critical question. Such an unexpressed purpose cannot be inferred lightly. *Parker* v. *Brown,* 317 U.S. 341, 63 S.Ct. 307 878 L.Ed. 315 (1943). There is not a scintilla of evidence to indicate that any legislative thought whatever was given to the application of Multi-State's long pending for hearing for Channel 9.

dicated within the legislative enactment — particularly where, as here, an antecedent right of substance would be harshly and oppressively affected.

It will be noted that the operative language of Section 331 makes no mention of the pending application of Multi-State or the existence of the comparative renewal case. It contains no authorization or suggestion of retroactive application to the pending renewal case. Indeed, as we have noted, *supra,* there is no indication that Congress gave any legislative thought to the pendency of Multi-State's application and the intended effect of the proposed statute upon it.

To condone this patent deprivation of due process, as the Court below has done, is plain error. *Lynch* v. *United States,* 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934). The unfair result produced by retroactive application in these circumstances should not be tolerated.

Equal Protection

Equal protection considerations attend the analysis of the treatment of Multi-State's case by the Court of Appeals when viewed in constitutional terms. "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " *Schneider* v. *Rusk,* 377 U.S. 497, 74 S.Ct. 693 (1954).

The Court of Appeals totally ignored the equal protection principle of the Fifth Amendment implicated in its holding that: "The enactment of Section 331, however, altered the statutory scheme discussed in *Ashbacker.* In Section 331 Congress makes one limited exception to the comparative hearing requirement. . . ." 728 F.2d at 1525. If this stated conclusion of the Court of Appeals is correct

then it is evident that the statute, Section 331, was designed not only to save RKO General from the loss of Channel 9 but also to target and destroy the only viable challenger for the Channel and the potential owner, thereof, namely, Multi-State. Such, in our view, is discrimination per se "so unjustifiable as to be violative of due process." *Schneider* v. *Rusk, supra. Yick Wo* v. *Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886). The statute adversely affects no other person and, hence, is constitutionally offensive, in its application.

CONCLUSION

The incorrect interpretation by the Commission and the Court below of the new Section 331 provides a safety net for a wrongdoer and deprives another of basic constitutional guarantees. For these reasons the reuqested writ of certiorari should be granted.

Respectfully submitted,

Joseph M. Morrissey*
Robert T. Murphy
WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 822-6900

Counsel for Petitioner
Multi-State Communications, Inc.

**Counsel of Record*

August 6, 1984

APPENDIX A

OPINION U.S. COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

Multi-State Communications, Inc.,
Appellant,

v.

Federal Communications Commission,
Appellee.

Nos. 83-1296 & 83-1325

March 6, 1984

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 83-1296 & 83-1325

MULTI-STATE COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

RKO GENERAL, INC., INTERVENOR

Appeals from Orders of the
Federal Communications Commission

Argued December 7, 1983

Decided March 6, 1984

Joseph M. Morrissey, with whom *Edward P. Morgan*, *Charles A. McNelis*, *Kevin T. Maroney*, and *Robert T. Murphy* were on the brief, for appellant.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, with whom *Bruce E. Fein*, General Counsel, and *Sue Ann Preskill*, Counsel, Federal Communications Commission, were on the brief, for appellee. *L. Andrew Tollin*, Attorney, Federal Communications Commission, also entered an appearance for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

J. Roger Wollenberg, with whom *Joel Rosenbloom*, *Thomas F. Connell*, *Bruce D. Ryan*, *Harold David Cohen*, *William H. Fitz*, *Jack N. Goodman*, and *Kevin R. Barry* were on the brief, for intervenor RKO General, Inc.

Before WRIGHT and TAMM, *Circuit Judges*, and LUTHER M. SWYGERT,* *Senior Circuit Judge* for the Seventh Circuit.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: Appellant, Multi-State Communications, Inc. (Multi-State), challenges two orders of the Federal Communications Commission (Commission). The first order reallocated television Channel 9 from New York to New Jersey and granted, without a comparative hearing, a five-year license to operate Channel 9 to Intervenor RKO General, Inc. (RKO). 53 Rad. Reg. 2d (P & F) 469 (1983). The second order dismissed as moot Multi-State's competing application for a license to operate Channel 9. 53 Rad. Reg. 2d (P & F) 671 (1983). Multi-State contends that these orders misconstrued section 331 of the Communications Act of 1934, 47 U.S.C.A. § 331 (West Supp. 1983), and violated Multi-State's constitutional rights. For reasons expressed below, we affirm the Commission's orders.

I. BACKGROUND

In 1972, RKO filed an application to renew its license to operate WOR-TV, a commercial television station on very high frequency (VHF) Channel 9 in New York City.[1] Shortly thereafter, Multi-State challenged RKO's renewal request by filing a competing application to operate Channel 9. Because the competing applications were mutually exclusive, the Commission ordered a

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* Sitting by designation pursuant to Title 28 U.S.C. § 294(d) (1976).

[1] RKO has been the licensee of VHF Channel 9 in New York City since 1952.

comparative hearing to determine which applicant was better qualified to be licensee of the New York station. *RKO General, Inc. (WOR-AV)*, 46 F.C.C.2d 246 (1974).

At the comparative hearing, the Commission indicated that it would examine six financial and character qualification issues. 46 F.C.C.2d at 250. Three of these issues were identical to issues already under consideration in another proceeding involving an application by RKO to renew its license to operate a Boston television station. *Id.* at 248-49. To avoid duplication, the Commission stated that its findings on the three common issues under consideration in the Boston proceeding would be res judicata on RKO's renewal request for the Channel 9 license. *Id.* at 249.

In the Boston proceeding, the Commission found that RKO lacked the requisite character qualifications for renewal of its Boston license. *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980), *aff'd*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). Because this finding was res judicata on RKO's renewal request for the Channel 9 license, the Commission denied renewal of RKO's license for Channel 9 in New York. *RKO General, Inc. (WOR-TV)*, 78 F.C.C.2d 357, 358 (1980). On December 4, 1981, this court reversed and remanded the Commission's decision regarding the Channel 9 license on the ground that the Commission had not provided a "principled explanation" for disqualifying RKO as the licensee of Channel 9.[2] *RKO General, Inc. v. FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

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[2] Specifically, this court stated that "[e]ach of RKO's renewal applications arises in different contexts and presents different levels of complexity. . . . [WOR-TV in New York is] entitled to an opportunity to appear directly before the Commission and to argue that [it] deserve[s] different treatment than RKO's Boston station." 670 F.2d at 237.

During the course of these administrative and judicial proceedings, Congressmen from New Jersey introduced legislation to secure a commercial VHF television station for their state. These efforts included a bill proposed in July 1982 by Senator Bradley of New Jersey that would require the Commission to issue a license to any existing licensee that volunteered to move to an unserved state.[3] Senator Bradley's bill became law on September 3, 1982, and stated:

> It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which [a] licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934.

47 U.S.C.A. § 331 [hereinafter cited as section 331].

On September 7, 1982, while its license renewal application was still pending, RKO notified the Commission that it agreed, pursuant to section 331, "to the reallocation of Channel 9 from New York, New York, to Secaucus, New Jersey, upon issuance by the Commission to RKO of a regular license . . . having a term of five

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[3] Senator Bradley's bill was appended as section 355 to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

years." Joint Appendix (J.A.) at 62. The Commission determined that a reallocation pursuant to section 331 should not be followed by a comparative hearing proceeding:

> [Section 331] specifically says that, upon notification by a licensee of its agreement to reallocate its channel to an unserved State, "the Commission shall, *notwithstanding any other provision of law*, order such reallocation and issue a license to such licensee" for a term of up to five years. The emphasized language, in our view, includes those statutory and regulatory provisions pertaining to comparative proceedings.

53 Rad. Reg. 2d at 471, J.A. at 3. Accordingly, the Commission ordered the reallocation and granted RKO a five-year license. 53 Rad. Reg. 2d (P & F) 469 (1983), J.A. at 1. In a companion order, the Commission dismissed as moot Multi-State's competing application for the Channel 9 license. 53 Rad. Reg. 2d (P & F) 671 (1983), J.A. at 19.

This appeal followed, in which Multi-State contends that the Commission's orders misconstrued section 331 and violated Multi-State's constitutional rights.

II. Analysis

A. *The Application of Section 331 to New Jersey*

Multi-State first argues that the Commission erred in reallocating Channel 9 to New Jersey because section 331 is, by its express terms, not applicable to New Jersey. Section 331 applies only to situations where an existing licensee volunteers to move its channel to "a State in which there is *allocated* no [VHF] commercial broadcast channel . . . ." 47 U.S.C.A. § 331 (emphasis added). Multi-State contends that the term "allocated" is synonymous with the term "assigned." In 1952, the Commission assigned Channel 13 to Newark, New Jersey, as a VHF

commercial station. *Television Assignments—Sixth Report and Order*, 41 F.C.C. 148, 258-59 (1952).[4] Because Channel 13 continues to be assigned to New Jersey in the Commission's Table of Assignments, 47 C.F.R. § 73.606 (b) (1982), Multi-State argues that New Jersey plainly is outside the scope of section 331.

At first glance, Multi-State's construction of "allocated" has some appeal. Construing a statutory term, however, requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires us to examine "the context in which statutory words are set—the statute's purpose, structure, and history . . . ." *Natural Resources Defense Council, Inc. v. EPA*, No. 81-2001, slip op. at 15 (D.C. Cir. Jan. 17, 1984). *See also FBI v. Abramson*, 456 U.S. 615, 625 & n.7 (1982). Our understanding of the purpose of section 331 and our examination of its legislative history compel us to reject Multi-State's construction of the term "allocated."

We first observe that although New Jersey was assigned Channel 13 in 1952, the Commission in 1961 approved the transfer of that channel's license from a commercial operator in New Jersey to a noncommercial operator in New York. *NTA Television Broadcasting Corp.*, 44 F.C.C. 2563 (1961). Since 1961, Channel 13 has been operated as part of the New York state educational network. 53 Rad. Reg. 2d at 470 n.2, J.A. at 2 n.2. Thus, prior to the enactment of section 331, New Jersey had been without an operating VHF commercial television station for more than twenty years. The absence of such a station resulted in dissatisfied television viewers in New Jersey due to incomplete coverage of local events. *See, e.g., Petition for Inquiry Into the Need for Adequate*

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[4] Television channels are assigned to communities in rulemaking proceedings, resulting in a Table of Assignments found at 47 C.F.R. § 73.606(b) (1982).

Television Service for the State of New Jersey, 58 F.C.C. 2d 790 (1976); *Second Report and Order*, 59 F.C.C.2d 1386 (1976); *Third Report and Order*, 62 F.C.C.2d 604 (1976).

Consequently, New Jersey Congressmen introduced legislation in an effort to secure a VHF station for their state.[5] On March 31, 1982, Senator Bradley of New Jersey introduced a bill that was identical in language to section 331.[6] 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982). When introducing this bill, Senator Bradley emphasized New Jersey's need for a VHF commercial television station.[7] *Id.* He said that this bill would solve New Jersey's problem because it

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[5] S. 1629, Sen. Amendment No. 868, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 4961, Sen. Amendment No. 1124, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 2128, 97th Cong., 1st Sess. (1981) (Rep. Guarini, D-N.J.); S. 1377, Amendment No. 202, 97th Cong., 1st Sess. (1981) (Sen. Bradley, D-N.J.); H.R. 7311, 96th Cong., 2d Sess. (1980) (Rep. Maguire, D-N.J.); H.R. 11,936, 95th Cong., 2d Sess. (1978) (Rep. Maguire, D-N.J.); S. 2853, 95th Cong., 2d Sess. (1978) (Sen. Case, R-N.J. & Sen. Williams, D-N.J.).

[6] Significantly, RKO earlier had announced its willingness to move from New York to New Jersey if it were issued a new license for VHF Channel 9. Reply Comments of RKO, BC Docket No. 80-719 at 2 (July 20, 1981), J.A. at 50. Senator Bradley was aware of RKO's announcement when he introduced his bill. 127 CONG. REC. S11,136 (daily ed. Oct. 6, 1981).

[7] Senator Bradley said:

> On several occasions, I have stood on this floor to explain . . . how important this issue is to the people of my State. Unfortunately, half of the State learns about New Jersey primarily from the perspective of New York and the other half of the State sees New Jersey from the eyes of Philadelphia.

128 CONG. REC. S3160 (daily ed. Mar. 31, 1982).

> directed [the Commission] to accept and grant the application of any current license holder who voluntarily requests to have its commercial VHF TV license moved to a State which does not have one.... It is my hope that with the barriers to a voluntary resolution to New Jersey's problem removed, a New York station owner will step forward to move to New Jersey.

Id. Although the Senate adopted Senator Bradley's bill, it was appended to another bill that did not become law.

Senator Bradley therefore introduced the same bill again on July 22, 1982. 128 Cong. Rec. S8922 (daily ed. July 22, 1982). The Bradley bill again passed the Senate and this time was added to the Tax Equity and Fiscal Responsibility Act of 1982. This bill, with the Bradley amendment, was referred to a House-Senate conference committee.[8] The conference committee retained the Bradley amendment and reported on the amendment as follows:

> New Jersey and Delaware are the only two States that do not have a commercial VHF television station. The [Bradley] amendment affirms the congressional intent that it is in the public interest for every State to have at least one VHF television station. In order to implement that intent, the amendment provides that, upon notice by any licensee in another State that it agrees to the reallocation of its channel to a community in a State in which there is no such channel, the Federal Communications Commission shall order the reallocation and issue a license to the licensee for such purpose.

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[8] On August 5, 1982, eight Congressmen wrote a letter to each member of the conference committee urging retention of the Bradley amendment. The letters stated that the effect of the amendment "is that WOR-TV in New York will be able to move to New Jersey and have its license reallocated there." Letter of Congressman John F. Seiberling, *et al.*, to Congressman John Dingell, Chairman, House Energy and Commerce Committee (Aug. 5, 1982), J.A. at 86.

> This provision will remove impediments which currently discourage a licensee in a State which has more than one VHF television station from voluntarily moving to a State which has none. It is the intention of Congress that any current licensee which exercises the option of seeking the transfer of its license to an unserved State . . . will . . . operate for the public benefit of the unserved State.

H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982). The conference report was adopted by both Houses on August 19, 1982,[9] and Senator Bradley's bill became law on September 3, 1982.

The frequent references to New Jersey make it clear that the sponsor and proponents of section 331 intended New Jersey to be within the statute's scope. More importantly, the conference report illustrates beyond cavil that Congress intended section 331 to apply to New Jersey. The conferees expressly noted that "New Jersey and Delaware are the only two States that do not have a commercial VHF television station. [Section 331 affirms and implements] the congressional intent . . . for every State to have at least one [such] station." H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep.

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[9] On the eve of the Senate's consideration of the conference report, Senator Bradley continued to emphasize that enactment of his bill would result in a VHF commercial television station for New Jersey:

> With the enactment of tonight's legislation, New Jersey will no longer be one of only two States in the country which has no VHF commercial television station. . . . One station has already expressed a desire to move to New Jersey. . . . [T]he reallocation of a license to New Jersey will mean that the licenseholder will move its studios and offices to New Jersey and operate in New Jersey for the benefit of the people in our State. . . . This station will not be a New Jersey station in name only. It will serve the people of New Jersey.

128 CONG. REC. S10,946 (Aug. 19, 1982), J.A. at 99.

No. 530, 97th Cong., 2d Sess. 690 (1982). The conferees thus clearly contemplated New Jersey as being within the ambit of section 331 notwithstanding that New Jersey already was assigned a VHF commercial channel. The conference report, viewed against the backdrop of five years of legislative efforts by New Jersey Congressmen to secure a VHF station for their state, reveals that the purpose of section 331 is to provide each "unserved" state with an *operating* VHF commercial television station. *Id.* Accordingly, we must reject Multi-State's invitation to construe "allocated" synonymously with "assigned," because such a construction would ignore congressional intent and thwart the legislative will. *See Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

B. *The Commission's Grant of the License to RKO*

Multi-State next argues that RKO is not a "licensee" within the meaning of section 331 in light of the Commission's earlier disqualification of RKO as the licensee of Channel 9. *See* 78 F.C.C.2d 357 (1980). Contrary to Multi-State's assertion, we find that RKO's earlier disqualification did not destroy its status as a licensee. When RKO volunteered to move from New York to New Jersey pursuant to section 331, RKO was the licensee of Channel 9. Although RKO's application for renewal of its license was before the Commission on remand from this court, *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982), RKO's status as a licensee during the pendency of the renewal proceeding was unaltered. *See* 5 U.S.C. § 558(c) (1982) (when a licensee applies for renewal, the license will not expire until the application has been finally determined by the agency); 47 U.S.C. § 307(d) (Supp. V 1981) (pending a final decision on a license renewal application, the Commission shall continue such license in effect).

Multi-State also contends that the Communications Act of 1934, 47 U.S.C. § 307 (1976 & Supp. V 1981),

mandates that the Commission conduct a comparative hearing to determine which of two or more competing license applicants would better serve the public interest. Multi-State therefore argues that the Commission erred in not conducting a comparative hearing for RKO and Multi-State with respect to Channel 9. We find no error in the Commission's decision to proceed without the comparative hearing. The plain language of section 331 commands that if any licensee volunteers to move to an unserved state, "the Commission *shall*, notwithstanding any other provision of law, *order such reallocation and issue a license* . . . ." 47 U.S.C.A. § 331 (emphasis added). *See Boyden v. Commissioner of Patents*, 441 F.2d 1041, 1043 n.3 (D.C. Cir.) ("'[s]hall' is the language of command"), *cert. denied*, 404 U.S. 842 (1971). The Commission thus complied with the plain language of the statute.

Furthermore, the phrase, "notwithstanding any other provision of law" overrides any prior, inconsistent provision of the Communications Act. *See New Jersey Air National Guard v. FLRA*, 677 F.2d 276, 283 (3d Cir.), *cert. denied*, 103 S. Ct. 343 (1982). *See also Devine v. White*, 697 F.2d 421, 429 (D.C. Cir. 1983); *Bryant v. Civiletti*, 663 F.2d 286, 292 (D.C. Cir. 1981). Through its use of the phrase, "notwithstanding any other provision of law," Congress expressly made inapplicable all provisions of law that would prevent or impede the voluntary movement of a VHF commercial station to an unserved state. This conclusion is buttressed by the conference committee report, which says that section 331 was designed to "remove impediments which currently discourage a licensee in a State which has more than one VHF television station from voluntarily moving to a State which has none." H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982). Section 331 thus displaced the normal procedures for channel reallocation as well as the normal

procedures for issuing licenses, including the requirement of a comparative hearing.[10]

C. *The Alleged Constitutional Violation*

Finally, Multi-State argues that its constitutional right to due process was violated when the Commission applied section 331 to deprive Multi-State of its vested right to a comparative hearing. Multi-State contends that it acquired a vested right to a hearing pursuant to the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). In *Ashbacker*, the Supreme Court, in construing section 309(a) of the Communications Act,[11] held that "where two *bona fide* [license] applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity

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[10] We also reject Multi-State's contention that the Commission's "cut-off" rules entitle Multi-State to a comparative hearing. The Commission's "cut-off" rules protect timely-filed license applicants from competition with late-filed applicants. *See* Bronco Broadcasting Co., 58 F.C.C.2d 909, 910-11 (1976). In this case, the Commission acted pursuant to section 331 to eliminate the availability of Channel 9 in New York to *any* applicant. The applications of RKO and Multi-State for the deleted New York channel became moot, and the Commission properly dismissed them both on this ground. 53 Rad. Reg. 2d (P & F) 671 (1983), J.A. at 19. Thus, the "cut-off" rules became inapplicable.

[11] Section 309(a) of the Communications Act provides:

> Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 309(a) (1976).

which Congress chose to give him." 326 U.S. at 333. Multi-State contends that the Commission committed constitutional error in interpreting section 331 so as to divest Multi-State of its right to a hearing pursuant to *Ashbacker*.

Contrary to Multi-State's assertion, the decision in *Ashbacker* does not confer upon Multi-State a constitutional right to a hearing. The right to a hearing in *Ashbacker* stemmed from a statutory scheme in the Communications Act that ordinarily precludes denial of a license application without a hearing. The enactment of section 331, however, altered the statutory scheme discussed in *Ashbacker*. In section 331, Congress made one limited exception to the comparative hearing requirement to achieve the overriding objective of bringing an operational VHF commercial television station to unserved states such as New Jersey and Delaware. Thus, in the limited context of section 331, Congress made moot the hearing procedures construed in *Ashbacker*.

Congress, of course, has paramount power in the regulatory field. *See F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958). We find section 331 to be permissible regulation of future action: it directs the Commission, under specified and limited circumstances, to reallocate a VHF channel and issue a license for that channel.[12] As the Supreme Court said in *Darlington*:

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[12] Congress acted within its lawful powers under the commerce clause in enacting section 331. The due process clause does not bar the exercise of those powers. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 611-12 (1960); Motor and Equipment Mfrs. Ass'n, Inc. v. EPA, 627 F.2d 1095, 1127 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980). *See also* Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 816 (D.C. Cir. 1974) (quoting McCullough v. Virginia, 172 U.S. 102, 123-24 (1898)) ("[l]egislation may act on subsequent proceedings, [and] may abate actions pending").

We note that licensees of broadcasting stations acquire no prescriptive right against the subsequent exercise of con-

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

358 U.S. at 91 (quoting *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947)).

We recognize that the Commission's action pursuant to section 331 terminates abruptly, albeit temporarily,[13] Multi-State's pursuit of a license for Channel 9. Nevertheless, Congress elevated the goal of providing unserved states with an operational VHF commercial television station. The Commission merely effected congressional intent. The fact that the Commission's action frustrated Multi-State's expectations is no basis for finding that the Commission committed constitutional error. *See Motor and Equipment Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1128 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 952 (1980).

III. Conclusion

In construing section 331, our duty is to find that interpretation which most fairly can be said to effect the legislative will. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Our interpretation of

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gressional power under the commerce clause to delete their station to achieve fair geographical distribution of broadcast service. Federal Radio Comm'n v. Nelson Brothers Bond and Mtge. Co., 289 U.S. 266, 282 (1933). *A fortiori*, the mere expectations of a license applicant cannot bar the legitimate exercise of such congressional power. As the Supreme Court has advised: "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Darlington*, 358 U.S. at 91.

[13] Multi-State may, of course, apply for a license for Channel 9 in New Jersey at the expiration of RKO's license.

section 331 coincides with that of the Commission. Although we sympathize with the situation in which Multi-State finds itself as a result of the Commission's orders, we find that the actions taken by the Commission were mandated by Congress. Accordingly, the Commission's orders are

Affirmed.

APPENDIX B

A. *Channel 9 Reallocation,* 53 RR 2d 469 (1983)

B. *RKO General, Inc. (WOR-TV),* 53 RR 2d 671 (1983)

CHANNEL 9 REALLOCATION (WOR-TV)

FCC 82-558
32956
48 FR 11711

In the Matter of	)	
	)	
Petition to Reallocate VHF Television Channel 9 from New York, New York, to a City Within the City Grade Contour of Station WOR-TV	)	BC Docket No. 80-719 RM-3682

Adopted: December 8, 1982
Released: March 11, 1983

[¶10:331, ¶53:24, ¶53:606] *Reallocation of VHF channel to New Jersey.*

Acting pursuant to the requirements of Section 331 of the Act, the Commission grants a New York City commercial television licensee's request that its channel be reallocated to Secaucus, New Jersey, and grants the licensee's license application for a term of five years. It is expected that the licensee will devote itself to meeting the special needs of its new community (and the needs of the Northern New Jersey area in general). Applications opposing the licensee's renewal and seeking permits to operate on its channel at New York are dismissed as moot; further, the existence of a commercial television station located in Northern New Jersey can be expected to have a significant effect upon the special obligations previously imposed upon New York City stations when those stations' licenses come up for review. Channel 9 Reallocation (WOR-TV), 53 RR 2d 469 [1983].

REPORT AND ORDER
(Proceeding Terminated)

By the Commission: Commissioners Fogarty and Rivera concurring in part and dissenting in part and issuing a joint statement at a later date; Commissioner Jones concurring in part and dissenting in part and issuing a statement; Commissioner Dawson concurring and issuing a statement.

1. In 1980 the Commission adopted a Notice of Proposed Rule Making, 84 FCC 2d 180 (1980), proposing to reassign Channel 9 from New York City to a community in Northern New Jersey with the present city grade contour of Station WOR-TV (Channel 9). On August 19, 1982, while this rule making proceeding was pending, Congress passed the Tax Equity and Fiscal Responsibility Act of 1982, which added Section 331 to the Communications Act of 1934, as amended (hereinafter Section 331).[1] This new section re-

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[1]The new Section 331 provides:

"It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which a licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee

quires the Commission to reallocate a VHF commercial television station to a community within a state that does not have such a station, upon notification from a licensee that it agrees to the relocation. Specifically, Section 331 directs that when a licensee notifies the Commission of its agreement to reallocation "to a community . . . the Commission shall, notwithstanding any other provision of law, order *such* reallocation. . . ." (Emphasis added.) Thus, the Commission's discretion in this matter, including determining the community of license, is limited by the express wording of the statute.

2. In response to this legislation, RKO has notified the Commission by letter dated September 7, 1982, that it agrees to the requirements of Section 331. In this regard, RKO states that it will relocate its main studio to Secaucus, New Jersey, upon issuance by the Commission of a license for a term of five years. It indicates that its transmitter will remain atop the World Trade Center in New York City. On the basis of this notification, we find that RKO satisfies the terms of Section 331,[2] and that we

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for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

[2]An examination of the television allocation table (§73.606(b) of the Commission's rules) shows that Channel 13, a non-reserved VHF television channel, is allocated to New Jersey. However, this channel has been used for more than twenty years by educational broadcasting Station WNET-TV for a *noncommercial* purpose as part of the New York state educational facilities network. Thus, RKO's application would represent the first provision of commercial VHF television service to New Jersey and would conform to the explicit Congressional intent to facilitate such service to the State of New Jersey. See 128 Cong. Rec. S10946 (daily ed. Aug. 19, 1982) (remarks of Sen. Bradley); 128 Cong. Rec. H6347 (daily ed. August 17, 1982) 128 Cong. Rec. S8923 (daily ed. July 22, 1982), and S. Rep. No. 97-530, 97th Cong., 2nd Sess. 690 (1982).

are now in a position to grant a first commercial VHF station to New Jersey by reallocating Channel 9 to Secaucus, New Jersey.[3] Moreover, in light of the passage of Section 331 and our action today in conformity with the statute we will terminate our rule making proceeding.[4]

3. In reassigning Channel 9 to serve New Jersey, we have not followed traditional assignment criteria developed pursuant to Section 307(b) of the Communications Act of 1934, as amended. In this regard, we have not undertaken an evaluation of communities eligible for licensing and their comparative needs for a local television station. Rather, we are guided strictly by what we perceive to be the intent of the legislation to license a station to "operate for the public benefit of the unserved state." S. Rep. No. 530, 97th Cong. 2d Sess.690 (1982). As the sponsor of the amendment stated:

> "[T]he reallocation of a license to New Jersey will mean that the license-holder will move its studios and offices to New Jersey and operate in New Jersey *for the benefit of the people in our State* . . . I intend to carefully monitor the development of any New Jersey station to insure that *it is responsive to the needs of my State. This station*

[3]Although the Commission previously denied renewal of RKO's license, RKO General, Inc. (WOR-TV), 78 FCC 2d 357 (1980), that decision has been remanded to the Commission by the U.S. Court of Appeals, RKO General, Inc. v. FCC, 670 F2d 215 [50 RR 2d 821] (DC Cir. 1981), cert. denied, ____ US ____, 102 S Ct 2931 (1982), and no action on the remand has been taken. Thus RKO's present status as a licensee qualifies it under Sections 307(d) and 331 of the Communications Act and Section 558(c) of the Administrative Procedure Act.

[4]Further compliance with the rule making procedures of the Administrative Procedure Act (e.g. further notices of proposed rule making etc.) is unncessary in light of the explicit direction from Congress in Section 331, to reallocate the channel upon notification by a licensee who qualifies under the statute.

will not be a New Jersey station in name only. It will serve the people of New Jersey."

128 Cong. Rec. 10946 (daily edition) August 3, 1982 (remarks of Senator Bradley) (emphasis added).

4. Thus we believe it would be appropriate to take steps toward carrying out this intention through a higher service responsibility within RKO's Grade B coverage area. We come to this conclusion regarding RKO's service based not only on the Congressional intent but also from RKO's statements pertaining to its own programming intentions. In its October 13, 1982 letter to the Commission, RKO stated ". . . RKO believes that as New Jersey's only VHF television station it will be desirable to orient the station's news and other informational programming to the entire region of New Jersey, which it will serve," indeed, RKO states that its specification of Secaucus as the city of license would allow it to devote more time to the needs of its entire New Jersey coverage area since the needs of Secaucus could be readily satisfied. In contrast, RKO suggests that the local needs of a much larger city, such as Newark, would require more time to satisfy, at the expense of the needs of the rest of its northern New Jersey service area.

5. Considering RKO's statements with regard to its programming expectations in conjunction with the clear Congressional intent, we anticipate that RKO's continued use of VHF Channel 9 will be directed toward satisfying the programming needs of its New Jersey Grade B coverage area. In the usual case, Secaucus, the city of assignment, would be the primary focus of the licensee's programming responsibilities. However, we have previously determined that the lack of local VHF television service to this highly populated area of northern New Jersey presented a unique

set of circumstances. See e.g., Docket 20350 2nd R&O, 59 FCC 2d 1386 [37 RR 2d 1275] (1976), wherein special service obligations have been imposed on all New York City and Philadelphia TV stations. Accordingly, we expect RKO to perform a higher degree of service to its Grade B coverage area than is normally required of a broadcast licensee. At renewal time RKO will be judged by how it has met the obligation to serve the greater service needs of Northern New Jersey, which we view as broader than the specific needs of Secaucus.

6. We have recognized that our action here moots the competing application of Multi-State Communications Inc. for the Channel 9 frequency (Docket Nos. 19991-19992). Multi-State's mutually exclusive application was pending when Section 331 was enacted. After a careful examination of both the terms and the legislative history of Section 331, however, we are convinced that Congress did not intend that any reallocation be followed by comparative hearing proceedings, including completion of proceedings which commenced prior to the passage of Section 331. The statute specifically says that, upon notification by a licensee of its agreement to reallocate its channel to an unserved State, "the Commission shall, *notwithstanding any other provison of law,* order such reallocation and issue a license to such licensee" for a term of up to five years. The emphasized language, in our view, includes those statutory and regulatory provisions pertaining to comparative proceedings.

7. Moreover, the legislative history of Section 331 indicates an explicit Congressional intent to facilitate commercial VHF television service to the State of New Jersey. See n. 2, supra. The Conference Report explaining Section 331 states:

> "It is the intention of Congress that any current licensee which exercises the option of seeking the transfer of its license to an unserved state under the terms of this section will move its studio and offices, *to and operate for the public benefit of the unserved State.*"

S. Rep. No. 530, supra, at 690 (emphasis added).

8. At the same time Section 331 does not give the Commission the power to force an unwilling licensee to move to New Jersey. Instead Congress here contemplated that a reallocation would occur only as a result of a licensee's voluntary notification of its agreement to such reallocation. RKO is the only licensee to come forward since the enactment of Section 331 and voluntarily agree to the reallocation of its channel to an unserved State. There is nothing in the record here to indicate, however, that RKO would be willing to undertake a reallocation to New Jersey if the pending comparative proceeding in which it was involved were to continue. Indeed, in its notification to the Commission pursuant to the statute, RKO stated that "it agrees to the reallocation of Channel 9 from New York, New York to Secaucus, New Jersey, *upon issuance by the Commission to RKO of a regular license for that purpose having a term of five years.*" (Emphasis added.) RKO recently stated its understanding that its notification pursuant to Section 331 would terminate the comparative proceeding:

> "Thus, Section 331 and RKO's acceptance of the reallocation of WOR-TV requires that the previous proceedings on Multi-State's application for Channel 9 in New York and RKO's renewal application for WOR-TV, New York, come to an end. When WOR-TV has moved to New Jersey, Channel 9 will no longer be available in New York. Consequently, by operation of the statute,

> the proceedings before the Commission concerning RKO's and Multi-State's applications for that channel will become moot when the Commission complies with the statute and issues a license to RKO for the reallocated Channel 9."

Letter to Chairman Mark S. Fowler, September 15, 1982.

9. It is also apparent that Congress was aware that Section 331 might apply, inter alia, to RKO,[5] and that the statute would affect competing applicants. In particular, Chairman Fowler wrote to Congressman John Dingell, Chairman of the House Energy and Commerce Committee on July 27, 1982, concerning an earlier version of the statute, S. 1629. In that letter Chairman Fowler stated that under the provisions of the proposed legislation:

> "[t]he Commission would be required to grant the renewal application of the VHF licensee in question without considering other public interest factors long used in making such a decision. . . . [C]ompeting applications for the licensee's facilities would be dismissed without comparison of the qualifications of the new applicant(s) vis-à-vis those of the incumbent licensee."

Multi-State itself raised those concerns during Congressional consideration of the earlier version of Section 331.

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[5]For example, in discussing the bill that was ultimately adopted, Senator Bradley stated: "It is my hope that an application will shortly be made. One station has already expressed a desire to move to New Jersey." 97 Cong. Rec. S10946 (daily ed. August 19, 1982). In addition, Congressman John F. Seiberling and seven other members of the House noted: "What this means is that WOR-TV in New York will be able to move to New Jersey and have its license reallocated there." Letter to Congressman John Dingell, Chairman, House Energy and Commerce Committee, August 5, 1982.

In letters sent to 22 Senators and Congressmen on May 19, 1982, Multi-State stated:

> "[Multi-State's] 'protected status' is well established by FCC regulations and recognized by the Commission in all its proceedings. The Bradley amendment [to S. 1629] disregards this recognized right of Multi-State and will totally destroy the longstanding equity of our protected position. . . . [The] amendment . . . destroys the recognized standing of one party."

10. Under these circumstances, we view the statute as a Congressional determination of the rights of competing applicants.[6] Accordingly, as discussed above, we have concluded that RKO's notification is sufficient to bring Section 331 into play and we have issued RKO the license it requests pursuant to that notification. We believe that these actions are compelled by the statute and Congressional intent, notwithstanding the adverse effects on Multi-State.

11. One issue raised in the Notice of Proposed Rule Making should be addressed at this time, i.e., the special service obligations now imposed upon New York and Philadelphia stations to provide better coverage to the needs of

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[6]The Commission's allocation and licensing functions are derived directly from the authority of Congress to regulate radio communications pursuant to its power to regulate interstate commerce. In delegating its authority, Congress sets forth the standards by which that authority will be exercised. FCC v. Pottsville Broadcasting Co., 309 US 134 (1940); Federal Radio Comm'n v. Nelson Brothers Bond & Mortgage Co., 289 US 266 (1933).

New Jersey residents.[7] When this obligation was imposed it was announced that a review of each station's performance would take place in connection with each station's renewal application. The period for renewing New York television stations is June 1, 1984, while the licenses for Pennsylvania television stations expire on August 1, 1984. The Notice announced that we did not intend to abandon this requirement. Rather the obligations imposed under the previous Commission order would continue to be scrutinized. We believe that a review of the performance of each stations' service obligations to New Jersey should take place as scheduled in connection with the renewals of these station licenses to determine the benefits occasioned by this program and the need to continue or eliminate the subject obligation. However, we note that the existence of a commercial VHF station located in northern New Jersey and licensed to serve the needs of this area may have a significant impact on the necessity to continue the special service obligations imposed upon the New York stations when they come up for review.

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[7]In connection with the rule making proceeding we have pending two "Motions to Strike." The first was submitted by Multi-State Communications, Inc. directed to a study attached to the comments of Andrew Maguire. The second motion relates to supplemental comments of RKO General, Inc. that pertain to the then pending-legislation (Section 331) and the appeal of the RKO case before the Court of Appeals. The subsequent enactment of Section 331 renders both of these matters moot.

Similarly, we have before us the request of Wm. J. Pascrell, Jr., Director of Policy Planning and Management, Paterson, New Jersey, to reopen the comment period in view of the enactment of Section 331, or in the alternative, to consider additional data regarding the needs of Paterson for the reassignment of Channel 9. As stated in the text, our discretion in this matter is limited by the express wording of the statute. Accordingly, the request will be denied.

12. Accordingly, it is ordered, that effective April 20, 1983, §73.606(b) of the Commission's rules, the Television Table of Assignments is amended for the following communities:

	Channel No.	*City*
Secaucus, New Jersey	9+	
New York, New York	2, 4, 5+, 7, 11+, *25, 31-	

13. Canadian concurrence in this action has been obtained.

14. Authority for the adoption of the amendments herein is contained in Sections 4(i), 303(r) and 331 of the Communications Act of 1934, as amended.

15. It is further ordered, that pursuant to Section 331 of the Communications Act of 1934, as amended, RKO General, Inc., the licensee of Station WOR-TV, Secaucus, New Jersey is hereby granted a license for a term of 5 years from the effective date of this action.[8]

16. It is further ordered, that this proceeding is terminated.

STATEMENT OF COMMISSIONER ANNE P. JONES
CONCURRING IN PART AND DISSENTING IN PART

I concur in the basic decision to reallocate Channel 9 to New Jersey because I agree that under existing circumstances such reallocation is, in effect, mandated by new Section 331 of the Communications Act. Although I find this action very problematical insofar as it moots Multi-

[8]RKO will be expected to file a renewal application at the end of its term that would specify a period extending to June 1, 1989, in order to make its license term consistent with the expiration date of all New Jersey television licenses.

State's competing application, I believe the Commission must bow in this matter to the apparent will of Congress.

I do not, however, agree with the majority that we need or should approve RKO's selection of Secaucus as its new community of license or issue this license for a 5-year term. On the first point, I believe it would make more sense, and better comport with the Act as a whole, to assign this channel to Newark, the largest city in New Jersey, rather than to the much smaller Secaucus. On the second point, I believe that limiting the term of this license to June 1, 1984, would serve two good purposes: it would conform the term of this license to those of all other New Jersey television licenses and also would provide an early opportunity for Multi-State to renew its bid for this license if it chooses to do so. On these points, therefore, I respectfully dissent.

CONCURRING STATEMENT OF
COMMISSIONER MIMI WEYFORTH DAWSON

I agree that Congress has left the Commission little discretion regarding the reallocation of Channel 9 to Secaucus, New Jersey, and the termination of the comparative renewal hearing involving WOR-TV.

However, I am concerned about the amorphous nature of the standard by which the Commission will judge WOR-TV's performance. In the decision the Commission indicates that it will hold WOR-TV accountable to a "higher service responsibility within RKO's Grade B coverage area." Sl. op. at 4. Even if the Commission wishes to impose such a "higher" service standard, I fear that our remarkable lack of clarity leaves the Commission with a virtually incomprehensible standard by which to measure WOR-TV. For example, does this standard mean that WOR-TV must produce some specific program or program series which deals with each of the cities within

WOR-TV's Grade B contour? Does it require the existence of new facilities or personnel in each of these cities? Such a protean criterion merely invites confusion and leaves the Commission even less able to judge WOR-TV's performance than it is to judge other licensees at renewal.

Finally, it seems obvious that the FCC's lack of clarity invites protracted litigation at WOR-TV's next renewal concerning the parameters of "higher service responsibility."

In short, I am afraid that the Commission's vague standard will ultimately create more problems for the Commission that it will solve, and, accordingly, I concur in the Commission's judgment.

JOINT STATEMENT OF COMMISSIONERS HENRY M. RIVERA AND JOSEPH R. FOGARTY CONCURRING IN PART, DISSENTING IN PART

Recognizing that the reallocation of Channel 9 to the State of New Jersey and the issuance of a license to RKO General to operate on that channel raise difficult legal questions, we nonetheless concur in these actions because they appear mandated by the Congress.[1] We dissent, however,

[1]See infra note 3 and accompanying text. In this regard, we are especially sensitive to Congress' sharp criticism of this Commission for its failure to heed the plain language of the lottery provision added to Section 309 of the Communications Act by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981). In reenacting successor legislation retaining the principles of original Section 309(i), the Conferees stated:

> "The Conferees considered [the FCC's failure to adhere to Congress' directive] to be in clear violation of the plain language of the statute, which mandated that the Commission prescribe lottery rules within 180 days, while permitting the agency discretion only with respect to when a lottery would actually be used. It was felt that as a creature of Congress, the Commission must obey the directives of its creator, and that it is not for the FCC to presume legislative intent when Congress clearly mandated that an ac-

from the issuance of a five-year license to this licensee, and from the majority's refusal to override RKO's selection of Secaucus as its community for license; these acts are not statutorily mandated and in our judgment they undermine congressional purpose.

Our decisions here abruptly inter a comparative renewal proceeding between RKO General and Multi-State Communications, Inc., which has continued for over a decade and has spanned all levels of the administrative and judicial processes. Despite the rights enjoyed by Multi-State under Ashbacker Radio Corp. v. FCC,[2] and despite the substantial resources Multi-State has expended in perfecting and pursuing its application for Channel 9, newly-enacted Section 331 of the Communications Act is evidently designed to arrest the pending comparative case if RKO agrees to move to New Jersey. [We do observe that the conclusion that RKO may utilize Section 331 in this circumstance and with this effect is not crystal clear on the face of the statute, but seems obvious as a matter of statutory construction.[3]] For this reason, we reluctantly ac-

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> tion be taken, or to refuse to take action because it felt that Congress had not passed the precise lottery statute it wanted."

Conference Report on Communications Act Amendments of 1982, H. Rep. No. 97-765, 97th Cong., 2d Sess. 23-24 (1982).

[2]326 US 327 (1945).

[3]The operative language of Section 331, which makes no direct mention of New Jersey, RKO, or pending comparative renewal cases, states:

> "In any case in which a licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a

cede to RKO's move and relicensing and to the termination of Multi-State's comparative hearing rights. Our reluctance stems from our concern that this termination of Multi-State's comparative hearing rights may be constitutionally invalid; however, recognize that constitutional review of federal statutes is ordinarily for the judiciary,

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license to such licensee for that purpose pursuant to such notification for a term not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, 641 (1982). Section 331's command that a license be granted to any licensee who notifies the Commission of its intent to relocate at the time of such notification notwithstanding any other provison of law, literally taken, leaves the Commission no choice but to disregard Multi-State's existing Section 309 comparative hearing rights. If the pending comparative renewal case were somehow continued, the identity of the licensee for the disputed channel would remain open to question until the conclusion of the hearing, a scenario inconsistent with the statutory directive that the FCC issue a license to any licensee upon receiving the specified notification. Nor does Section 331 appear to contemplate the grant of a "conditional" license or other abnormal authorization that would permit both the issuance of a license to RKO and continuation of the Multi-State proceeding. Furthermore, as RKO General chronicles at length in its September 15, 1982 letter to Chairman Fowler, it seems plain from Section 331's legislative history that Senator Bradley, Section 331's chief architect and sponsor, and other key members of Congress, including the Conferees on the tax legislation with which Section 331 was enacted, contemplated that RKO could be a beneficiary of the legislation notwithstanding the pendency of the WOR-TV proceeding. See Letter to Congressman John Dingell from Congressman John Seiberling, dated August 5, 1982; 128 Cong. Rec. S10946 (Aug. 19, 1982) (remarks of Senator Bradley on Section 395 of the 1982 tax bill); 128 Cong. Rec. S3160 (March 31, 1982) (remarks of Senator Bradley on S. 1629, the predecessor to Section 331); 127 Cong. Rec. S11136 (Oct. 6, 1981) (same). See also Conference Report on the Tax Equity and Fiscal Responsibility Act of 1982, S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982).

not this agency[4] which, as an arm of Congress, must implement congressional directives.[5]

Having concluded that Congress intended the Commission to issue RKO an unconditional license to serve New Jersey upon the requisite notification, we nevertheless strongly disagree with the majority's view that Section 331 binds the Commission to grant that license for a five-year term and to accept the particular city specified by RKO as Channel 9's community of license. Moreover, as a matter of policy, the majority's action on these issues is inconsistent with the legislative purpose of Section 331 and

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[4]See Califano v. Sanders, 420 US 99, 109 (1977).

[5]We are nonetheless deeply troubled by the prospect that our actions here violate Multi-State's due process rights. The essential question, it seems to us, is whether extinguishing the WOR-TV comparative renewal proceeding impermissibly deprives Multi-State of its Section 309 comparative hearing rights and, thus, of due process of law. See generally United States Trust Co. of New York v. New Jersey, 431 US 1, 17 n. 13 (1977); Usery v. Turner Elkhorn Mining Co., 428 US 1, 16-17 (1976) ("It does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."); Elliot v. Volpe, 328 F Supp 831 (D. Mass. 1971) (denying retroactive application of National Environmental Policy Act in order to avoid disruption of antecedent rights); Southwestern Petroleum Corp. v. Udall, 361 F2d 650, 654 (10th Cir. 1966) ("Except as rights are vested, the benefits of existing legislation may be superseded or be modified by later legislation."); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 695 (1960); C. Sands, Sutherland on Statutory Construction §41.06 (statutes affecting vested rights) (4th ed. 1973).

Resolution of this issue turns on a number of sub-issues, namely, whether Multi-State had a legal right to have its application compared with that of RKO General and, if so, whether that right vested prior to enactment of Section 331. If Multi-State is deemed to have had a vested right, the next question is whether statutory divestiture of that right works "harsh and oppressive" consequences against it and, thus, violates due process of law. See id. See also Welch v. Henry, 305 US 134, 147 (1938).

disserves the people of New Jersey, who are the primary intended beneficiaries of this provision.

Section 331 empowers the Commission to grant a license "for a term *not to exceed* five years" (emphasis added). It is obvious that a license issued under this provision can carry a term of *less than* five years. Any other reading of this phrase would torture its plain meaning. Nor does the pertinent legislative history suggest that Congress intended an alternative construction.[6] Therefore, the Commission had the discretion to license RKO for a term shorter than five years and, we believe, for several reasons, licensing RKO for more than 18 months was ill-advised.

An 18-month term would have synchronized RKO's license term with the June 1, 1984 renewal cycle filing date applicable to all other licensees in this geographical area. Beyond this administrative housekeeping benefit, calling for RKO's renewal in 18 months would have let us assess whether RKO is truly serving New Jersey's particularized

[6]The only discussion relevant to the point is Senator Bradley's statement that the intended Section 331's predecessor, S. 1629, to serve as "an inducement to undertake the expense of moving studio facilities [by requiring] the FCC . . . renew [the] license for up to five years." 128 Cong. Rec. S3160 (March 31, 1982). This reasoning does not, contrary to RKO's suggestion in its September 15, 1982 letter, compel the issuance of a five-year grant. RKO has every inducement to move, given that its outright relicensing would extinguish Multi-State's long-pending comparative challenge. A shorter license term would not undercut this inducement; it would simply require RKO to file a renewal application sooner than the five year outer limit specified in Section 331. Aside from the obvious benefit of ridding RKO of a bothersome comparative proceeding, the relatively minor effort required of RKO to satisfy Section 331 further negates any argument that a five-year grant is necessary to "induce" RKO to serve New Jersey. To meet the bare terms of the statute, RKO need only lease main studio facilities across the New York border in northern New Jersey; that is precisely what it proposed. RKO plans to use the *identical* transmitters it now uses to serve New York, and will broadcast to the *identical* area it has served for many years as a New York licensee.

needs (despite the fact that its coverage area will remain completely unchanged), consistent with Congress' dominant purpose in enacting Section 331. Congress obviously intended a public interest quid pro quo for authorizing RKO's release from the pending comparative hearing. That quid pro quo is real service to the people of New Jersey, and it is the responsibility of this Commission to ensure that RKO complies with this condition.

Early examinaton of RKO's performance also would have helped the Commission to determine whether to continue the special New Jersey service obligations imposed on selected New York and Philadelphia licensees — a decision to be made in 1984[7] when these licensees' renewal applications will be filed and evaluated. These special service obligations stem from the finding that New Jersey's needs are not now being properly served. Without a record upon which to judge whether RKO is adequately satisfying those unmet needs, it is difficult to understand on what basis, other than sheer speculation, this agency will determine whether the situation that prompted the special service requirements has finally been remedied.

Awarding RKO an 18-month license would, in addition, have been in accord with the spirit of New South Media Corp. v. FCC,[8] where the Court of Appeals chastized the FCC for unreasonably insulating RKO General's many licenses from challenge by competing applications contrary to the Ashbacker doctrine. The majority here has again forestalled the competition so strongly endorsed in New South Media. Because an 18-month license grant

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[7]These obligations were imposed in the Second Report and Order, 59 FCC 2d 1386 (1976), aff'd, New Jersey Coalition for Fair Broadcasting v. FCC, 574 F2d 1119 (3rd Cir. 1978). See CBS, Inc., 52 RR 2d 353 (1982) (enforcing special service obligations.).

[8]____ F2d ____, No. 80-2556 (DC Cir., August 13, 1982).

would better accord with Section 331 and its legislative purpose, with the Commission's own administrative needs, and with recent judicial admonition, we are at a loss to understand the rationale for the majority's action.

We also dissent from the majority's refusal to override RKO's designation of Secaucus as its new community of license. As with the license term issue, we do not interpret Section 331 as denying the Commission discretion to select the allocation that would best serve New Jersey's needs. The statute mandates a grant upon receipt of any existing licensee's notification of its consent to move to a state without a commercial VHF station. An argument can be made that the language "that such licensee will agree to the reallocation of its channel to a community within a state" is intended to repose complete discretion in a licensee to select its new community of operation. Such construction, however, would substantially undermine the statutory intent that New Jersey's needs, not the licensee's, be optimally served. In this connection, the Conference Report states:

> "It is the intention of Congress that any current licensee which exercises the option of seeking the transfer of its license to an unserved State under the terms of this section will move its studio and offices to, and operate for the public benefit of the unserved State."[9]

Senator Bradley underscored that the fundamental purpose of Section 331 was to ensure that the contemplated New Jersey station "is responsive to the needs of my State. This station will not be a New Jersey station in name only. It will serve the people of New Jersey."[10]

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[9]S. Rep. No. 760, 97th Cong. 2d Sess. 690 (1982).

[10]128 Cong. Rec. S10946 (August 3, 1982).

We cannot accept the view that allocating Channel 9 to Secaucus, a town with approximately 13,000 residents, implements or accords with the will of Congress. The majority by circulation vote has added a sui generis condition requiring RKO to render primary service to its entire Grade B service area, not just Secaucus. However, based on the record compiled in response to the FCC's outstanding 1980 rule making proposal to reassign Channel 9 to northern New Jersey, Channel 9 should be reassigned to Newark, as our Mass Media Bureau originally recommended. Newark is New Jersey's largest city, and is said to be the largest major city in the country without a conventional television station. Under ordinary allocation principles,[11] reassignment to Newark would best achieve Congress' desire to provide adequate, effective service to the people of New Jersey. To ensure that WOR-TV will be responsive to all of northern New Jersey, not just to the needs of Newark, the Commission could have specified an enhanced Grade B contour service duty, as the majority has done in this Order with respect to the designation of the town of Secaucus as the community of license. This alternative would have better served the congressional purpose underlying Section 331 as well as established Section 307(b) allocation principles.

In conclusion, the constitutional challenge posed by Section 331 is considerable, as indicated at the outset. The majority has needlessly and unwisely magnified the challenge posed by Section 331 by granting RKO a full five-year license and by designating Secaucus as WOR-TV's new community of license in a manner that does not place sufficient emphasis on the needs of the residents of New Jersey. From the objectionable decisions detailed above, we dissent.

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[11]Sixth Report and Order, 41 FCC 148, 167 (1952) (Television Assignments).

RKO GENERAL, INC. (WOR-TV)

FCC 82-559
94940

In re Applications of	)	
	)	
RKO GENERAL, INC. (WOR-TV)	)	Docket No. 19991
New York, New York	)	File No. BRCT-71
	)	
For Renewal of Broadcast License	)	
	)	
MULTI-STATE COMMUNICATIONS,	)	Docket No. 19992
INC., New York, New York	)	File No. BPCT-4527
	)	
For Construction Permit for New	)	
Television Broadcast Station	)	

Adopted: December 8, 1982
Released: March 29, 1983

[¶10:331] *Dismissal of opposing application following reallocation.*

Following reallocation of VHF Channel 9 from New York City to Secaucus, N.J., and grant of the New York licensee's application to operate the channel from the New Jersey community (action mandated by Section 331 of the Act), a competing construction permit application and other pleadings filed in the renewal proceeding relating to the New York Station are dismissed as moot. RKO General, Inc. (WOR-TV), 53 RR 2d 671 [1983].

ORDER

By the Commission: (Commissioners Fogarty, Jones and Rivera concurring in the result.)

1. On April 10, 1974,[1] the above captioned matter was designated for hearing. At that time RKO was also engaged in a contest involving its license renewal application for Sation WNAC-TV, Boston, Massachusetts.[2] In light of questions arising in that proceeding, the Commission conditioned any possible grant of RKO's license renewal for Station WOR-TV on the outcome of the Boston proceeding.[3] Ultimately, the Commission concluded that RKO was unqualified to remain the licensee of Station WNAC-TV[4] and that this conclusion compelled a similar determinaton with respect to RKO's qualifications to remain the licensee of WOR-TV.[5] On appeal, the court affirmed the conclusion reached in the Boston proceeding but held that the narrow ground for disqualification did not automatically warrant RKO's disqualification as the licensee of WOR-TV.[6] It thus remanded the New York proceeding to the Commission with instructions to ascertain specifically the impact of the conclusions reached in the Boston proceeding on RKO's qualifications to remain a licensee of its New York station.

2. On August 19, 1982, before the Commission had an opportunity to consider the above question, the Congress

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[1]RKO General, Inc. (WOR-TV), 46 FCC 2d 246 [29 RR 2d 1444] (1974).

[2]RKO General, Inc. (WNAC-TV), Docket Nos. 18759-61 (Boston, Massachusetts). Questions of RKO's qualifications were first raised in a third proceeding involving RKO. See RKO General, Inc. (KHJ-TV), Los Angeles, California (Docket Nos. 16679 and 16680).

[3]RKO General, Inc. (WOR-TV), 69 FCC 2d 461 [43 RR 2d 1141] (1978).

[4]RKO General, Inc. (WNAC-TV), 78 FCC 2d 1 [47 RR2d 921] (1980).

[5]RKO General, Inc. (WOR-TV), 78 FCC 2d 357 (1980).

[6]RKO General, Inc. v. FCC, 670 F2d 215 [50 RR 2d 821], cert. denied, 102 S Ct 1978 (1982).

of the United States passed the Tax Equity and Fiscal Responsibility Act of 1982. Section 355 of that Act amends the Communications Act of 1934 and reads as follows:

> "Section 331. It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial televsion broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

3. On September 6, 1982, after the bill was signed into law, RKO notified the Commission that it would agree to a reallocation of its license for Channel 9, WOR-TV, New York City, to a site in New Jersey, a State which currently has no operational very high frequency (VHF) commercial television broadcast station. In accordance with the Congressional mandate of Section 355 of the 1982 tax act the Commission has by separate action today ordered the reallocation of Channel 9, New York City, to Newark, New Jersey, and has issued RKO a license for that station for a term of five years [see 53 RR 2d 469. -Ed].

4. Consistent with that Order the present proceeding may therefore be terminated[7] and numerous pleadings pending in this proceeding will be dismissed as moot or otherwise disposed of as follows.

5. Accordingly, it is ordered, that the Petition for Leave to Amend filed September 26, 1979 by RKO General, Inc. is granted and the amendment is accepted.[8]

6. It is further ordered, that the Petition for Leave to Amend filed May 28, 1980 by RKO General, Inc. is granted and the amendment is accepted.[9]

7. It is further ordered, that the Petition for Reconsideration filed September 11, 1978 by Multi-State Communications, Inc. is dismissed as moot.

8. It is further ordered, that the Motion to Enlarge Issues filed August 25, 1980 by RKO General, is dismissed as moot.

9. It is further ordered, that the Petition for Leave to Amend filed January 8, 1980 by Multi-State Communications, Inc. is dismissed as moot.

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[7]Given the explicit legislative directive that a license be issued "notwithstanding any other provision of law," previous questions as to RKO's qualifications to be the licensee of WOR-TV, New York City, and as to the comparative qualifications of Multi-State are no longer relevant to the disposition of this proceeding.

[8]This unchallenged petition reported media related interests of RKO General, Inc. and good cause for its acceptance has been shown.

[9]This uncontested petition provided information on dismissal of certain litigation against General Tire & Rubber Co. and Frontier Airlines, Inc. Good cause for acceptance of this amendment has been demonstrated by RKO.

10. It is further ordered, that the Petition for Waiver of Rule filed February 7, 1980 by Multi-State Communications, Inc. is dismissed as moot.

11. It is further ordered, that the Petition for Leave to Amend filed June 9, 1980 by Multi-State Communications, Inc. is dismissed as moot.

12. It is further ordered, that the Petition for Leave to Amend filed January 12, 1981 by Multi-State Communications, Inc. is dismissed as moot.

13. It is further ordered, that the Petition for Intervention and Special Relief filed July 7, 1980 by the New Jersey Coalition for Fair Broadcasting is dismissed as moot.

14. It is further ordered, that the Petition for Leave to Intervene and Motion to Open Proceedings for New Applications, filed August 14, 1980 by Crossroads Communications is dismissed as moot.

15. It is further ordered, that the Motion to Dismiss Crossroad Communications' Unauthorized Reply to Oppositions to Petition for Leave to Intervene filed September 10, 1980 by the Broadcast Bureau is dismissed as moot.

16. It is further ordered, that the Opposition to Broadcast Bureau's Motion to Dismiss its Reply and Request for Leave to File its Reply filed September 19, 1980 by Crossroads Communications is dismissed as moot.

17. It is further ordered, that the Motion to Strike Comments of Senators Bill Bradley and Harrison A. Williams, Jr. filed July 9, 1980 by Multi-State Communications, Inc. is dismissed as moot.

18. It is further ordered, that the Petition to Hold in Abeyance filed March 22, 1979 by RKO General, Inc. is dismissed as moot.

19. It is further ordered, that the Motion to Expedite WOR-TV Remand Proceeding and Escrow WOR-TV Profits filed November 4, 1982 by Multi-State Communications, Inc. is dismissed as moot.

20. It is further ordered, that the application of Multi-State Communications, Inc. for a construction permit and the application of RKO General, Inc. for renewal of license of Station WOR-TV are dismissed as moot, consistent with our ruling this same date reallocating Channel 9 to a community in New Jersey.

21. It is further ordered, that this proceeding is terminated.

APPENDIX C

A. Order of the United States Court of Appeals
District of Columbia Circuit denying rehearing
May 7, 1984

B. Order of the United States Court of Appeals
District of Columbia Circuit denying suggestion
for rehearing *en banc*
May 7, 1984

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1296 September Term, 19

Multi-State Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

RKO General, Inc.,
Intervenor

And Consolidated Case No. 83-1325

BEFORE: Wright and Tamm, Circuit Judges, and Swygert*, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit

ORDER

On consideration of Appellant's Petition for Rehearing, filed April 20, 1984, it is

ORDERED by the Court that the aforesaid Petition for Rehearing is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit
Filed May 7, 1984
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1296 September Term, 19

Multi-State Communications, Inc.,
Appellant

v.

Federal Communications Commission,
Appellee

RKO General, Inc.,
Intervenor

And Consolidated Case No. 83-1325

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges, and Swygert*, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed April 20, 1984, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

United States Court of Appeals
for the District of Columbia Circuit
Filed May 7, 1984
GEORGE A. FISHER
Clerk

APPENDIX D

A. 47 U.S.C. Section 331 (1982)

B. CURRENT TABLE OF ASSIGNMENTS OF VHF TELEVISION CHANNELS IN NEW YORK AND NEW JERSEY
(Section 73.606, FCC Rules and Regulations)

TEXT OF NEW SECTION 331 OF THE COMMUNICATIONS ACT OF 1934 AS AMENDED

47 U.S.C. §331

"It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which a licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high fequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934."

	Channel No.
Montana:	
Anaconda	2+
Billings	2, 8, *11, 14, 20+
Bozeman	*9
Butte	4, 6+, *7−, 18, 24
Cut Bank	*14−
Dillon	*14+
Glendrive	5+, 9+, *16−
Great Falls	3+, 5+, 16, 26, *32
Hardin	4+
Havre	9+, 11+, *18−
Helena	10+, 12, *15+
Kalispell	9−, *29−
Lewistown	13
Miles City	3−, *6, 10
Missoula	8−, *11−, 13−, 17−, 23−
Wolf Point	*17+
Nebraska:	
Albion	8+, *21+
Alliance	*13−
Bassett	*7−
Grand Island	11−, 17−
Hastings	5−, *29+
Hayes Center	6
Hay Springs	4+
Kearney	13
Lexington	*3+
Lincoln	10+, *12−, 45, 51
McCook	8−
Merriman	*12
Norfolk	*19+
North Platte	2−, *9+
Omaha	3, 6+, 7, 15, *26, 42+, *48−

Scottsbluff ..... 10—
Superior ..... 4+

Nevada:

Boulder City ..... 5+
Elko ..... 10—, *14+
Ely ..... 3—, 6+
Fallon *25
Goldfield ..... 2—
Las Vegas ..... 3, 8—, *10+, 13—, 21+
McGill *13
Reno ..... 2, 4, *5, 8, 21+, 27+
Tonopah ..... 9—, *17+
Winnemucca ..... 7+, *15—
Yerington ..... *16+

New Hampshire:

Berlin ..... *40—
Concord ..... 21+
Durham *11
Hanover ..... *15+, 31
Keene ..... *52+
Littleton ..... *49+
Manchester ..... 9—, 50—, 60+
Portsmouth ..... [1]17—

New Jersey:

Asbury Park ..... [5]58
Atlantic City ..... *18, *36, 53+
Burlington ..... 48—
Camden ..... *23+
Little Falls ..... *50+
Newark ..... 13—, 68
New Brunswick ..... *19—[1], 47+, *58
Paterson ..... 41—
Trenton ..... *52—
Vineland ..... 65—
Wildwood 40

New Mexico:
Alamogordo *18–
Albuquerque .. 4+, *5+, 7+, 13+, 14–, 23–, *32+
Carlsbad ..... 6–, *15+, 25–
Clayton *17
Clovis ..... 12+
Deming *16
Farmington ..... 12+, *15+
Gallup 3, *8–, 10
Hatch *12
Hobbs ..... 29+
Las Cruces ..... *22–, 48+
Lovington *19
Portales ..... *3+
Raton *18–
Roswell ..... 8, 10–, 21–, 27–, *33+
Santa Fe ..... 2+, *9+, 11–, 19–
Silver City ..... 6, *10+
Socorro *15–
Tucumcari *15

New York:
Albany-Schenectady ..... 6, 10–, 13, *17+, 23–, *29+, 45
Amsterdam ..... *39+, 55
Binghamton ..... 12–, 34, 40–, *46+
Buffalo ..... 2, 4–, 7+, 17, *23, 29–, 49–
Carthage 7–
Corning *30
Elmira ..... 18+, 36–
Glens Falls *58–
Ithaca ..... 52, *65+
Jamestown ..... 26+, *46
Kingston 63
Lake Placid ..... 5, *34+
Levittown *21–
Massena *18

New York ..... 2, 4, 5+, 7, 9+, 11+, *25, 31–
Oneonta ..... 15,[1] *42
Patchogue 67
Plattsburg *57
Poughkeepsie ..... 54+
Riverhead ..... 55+
Rochester ..... 8, 10+, 13–, *21, 31+, *61+
Syracuse ..... 3–, 5–, 9–, *24+, 43+, 62+
Utica ..... 2–, 20+, 33, *59
Watertown ..... *16, 50+

North Carolina:

Asheville ..... 13–, 21+, *33, 62+
Burlington 16
Chapel Hill ..... *4+
Charlotte ..... 3, 9+, 18, 36, *42+
Columbia *2
Concord *58
Durham ..... 11+, 28+
Fayetteville ..... 40+, 62
Franklin ..... *56+
Goldsboro 17–
Greensboro 2–, 48–, 61
Greenville 9–, 14, *25
Hickory 14–
High Point ..... 8–, *32+
Jacksonville 19
Kannapolis 64–
Lexington 20
Linville *17
Morganton 23–
New Bern ..... 12+
Raleigh 5, 22, *34–
Rocky Mount 47–
Washington 7
Waynesville 59
Wilmington ..... 3–, 6, 29+, *39–

Wilson ..... 30−
Winston-Salem ..... 12, *26+, 45

North Dakota:

Bismarck ..... *3, 5, 12−, 17−, 26+
Devils Lake ..... 8+, *22+
Dickinson ..... 2+, *4−, 7
Ellendale ..... *19−
Fargo ..... 6, 11+, *13, 15−
Grand Forks ..... *2, 14+, 27+
Jamestown ..... 7−, *23
Minot ..... *6+, 10−, 13−, 14−, 24
Pembina 12

[1] Following the decision in Docket No. 18261, channels so indicated will not be available for television use until further action by the Commission.

Channels reserved for non-commercial use are indicated by an asterisk. [5] This channel is not available for use at Ashbury Park unless and until it is determined by the Commission that it is not needed for educational use at New Brunswick, N.J.

Office - Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS
CLERK

No. 84-215 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1984

MULTI-STATE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JACK D. SMITH
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

SUE ANN PRESKILL
Counsel
Federal Communications Commission
Washington, D.C. 20554

1980

QUESTIONS PRESENTED

1. Whether Section 331 of the Communications Act of 1934, as amended, authorized the Federal Communications Commission to reallocate VHF Channel 9 from New York City to New Jersey and to issue a license for that channel to the existing licensee without conducting a comparative hearing when the licensee notified the Commission that it would reallocate its channel to a community in New Jersey.

2. Whether Section 331 as applied by the Commission denied due process to an applicant for Channel 9 in New York City whose application was dismissed as moot when the channel applied for was no longer available.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-215

MULTI-STATE COMMUNICATIONS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-16a) is reported at 728 F.2d 1519. The report and orders of the Federal Communications Commission (Pet. App. 19a-44a) are reported at 53 Rad. Reg. 2d (P & F) 469 and 53 Rad. Reg. 2d (P & F) 671.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1984. Rehearing was denied on May 7, 1984 (Pet. App. 47a-49a). The petition for a writ of certiorari was filed on August 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1972 RKO General, Inc. (RKO), then the incumbent licensee of Channel 9 in New York City, filed its license renewal application, and petitioner Multi-State Communications, Inc. (Multi-State) filed a competing application for

the frequency. After a lengthy comparative hearing, the Commission denied RKO's renewal application, but the court of appeals remanded on the ground that the Commission had not provided a "principled explanation" for disqualifying RKO. *RKO General, Inc. (WOR TV)*, 78 F.C.C. 2d 357 (1980), 670 F.2d 215, 237 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

While the remand proceeding was in progress, members of Congress from New Jersey introduced legislation to secure a VHF commercial television outlet for that state. New Jersey had lacked a commercial VHF station since 1961, when the Commission approved the transfer of the license for Channel 13 in Newark to a noncommercial entity, and the new licensee obtained Commission approval to locate its main studio in New York. *NTA Television Broadcasting Corp.*, 44 F.C.C. 2563 (1961). Despite the relocation of Channel 13's principal studio, the Commission's Table of Assignments, 47 C.F.R. 73.606(b), continued to list Channel 13 as assigned to Newark. Over the next two decades, officials and residents of New Jersey, who had objected to the Commission's 1961 action, repeatedly pressed the Commission to improve service to that state. See, *e.g., Petition for Inquiry into the Need for Adequate Television Service for the State of New Jersey*, 58 F.C.C. 2d 790 (1976), aff'd sub nom. New Jersey Coalition for Fair Broadcasting v. *FCC*, 574 F.2d 1119 (3d Cir. 1978); *CBS, Inc.*, 91 F.C.C. 2d 167 (1982). One proposal, for example, would have had the Commission reallocate an existing channel to New Jersey even without the cooperation of the station licensed on that channel. However, the Commission was reluctant to force a licensee to move to New Jersey for a number of reasons, including the difficulty in selecting the licensee that would be forced to move and the Commission's concern that a New Jersey licensee would lack a sufficient economic base to provide the local news and

public affairs coverage desired by those seeking a VHF station for New Jersey. See *Petition for Inquiry*, 58 F.C.C. 2d at 803-804. When the Commission denied RKO's renewal application for Channel 9 in New York City, the prospect for a vacant channel arose, but the availability of a vacant channel for reallocation again seemed remote after the court of appeals remanded the denial of RKO's application.

Without some special incentive, it appeared unlikely that an existing licensee would volunteer to leave New York or Philadelphia, the nation's first and fourth largest markets, in order to move to New Jersey. The availability of advertising revenue in New Jersey was unproven, and it would be costly to move equipment and personnel and to acquire new offices and studios. See *Petition for Inquiry*, 58 F.C.C. 2d at 803. Any licensee who might otherwise have volunteered to move was also likely to be inhibited by the Commission's usual practice of calling for new competing applicants whenever a channel is reallocated to a new city. See, *e.g.*, *Riverside-Santa Ana, California*, 65 F.C.C. 2d 920 (1977), reconsideration denied, 68 F.C.C. 2d 557 (1978); *Tucson, Arizona*, 37 Rad. Reg. 2d (P & F) 1161 (1976); *Los Angeles, California*, 31 F.C.C. 2d 666 (1971); *Chapman Radio & Television Co.*, 1 F.C.C. 2d 1402 (1965).

Against this background, Congress intervened and provided an incentive for a licensee to volunteer to move to New Jersey. The Communications Act of 1934 was amended in 1982 to require the Commission, upon notification from a VHF licensee of its willingness to reallocate its channel "to a community within a State in which there is allocated no very high frequency [VHF] commercial television broadcast channel," to "order such reallocation and issue a license to such licensee" for a term of up to five years, "notwithstanding any other provision of law." 47 U.S.C. 331. The legislative history made clear that the statute was intended

to allow a licensee that volunteered to move to do so without having to face an immediate comparative hearing.[1]

2. On September 7, 1982, RKO, whose renewal application for Channel 9 in New York City was then pending on remand from the court of appeals, notified the Commission that it was prepared to relocate its station from New York City to Secaucus, New Jersey, upon issuance of a regular 5-year license. The Commission found that RKO satisfied the terms of the statute and thereupon reallocated the channel to Secaucus and granted RKO a license for a five-year term. Pet. App. 19a-29a.

In its decision, the Commission recognized that the Commission's Table of Assignments continued to assign VHF Channel 13 to Newark, New Jersey, and that this channel was not reserved for noncommercial use. However, as the Commission noted, this channel had in fact been used for noncommercial purposes for over 20 years. Thus, reallocation of Channel 9, as proposed by RKO, would provide New Jersey with its only commercial VHF station "and

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[1]Senator Bradley, the sponsor of the bill that eventually became law as part of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 *et seq.*, explained that his bill would

> remove the impediments which currently discourage an existing licensee in either New York or Philadelphia from voluntarily seeking to move to New Jersey. Under current law, that request would automatically trigger an action to open up that license to new applicants. In other words, the license would automatically be at risk to the current licenseholder. This makes it very unlikely that anyone would voluntarily offer to move to New Jersey.

128 Cong. Rec. S10946 (daily ed. Aug. 19, 1982). Senator Bradley also noted that "[a]s an inducement to undertake the expense of moving studio facilities, the FCC is directed to renew that license for up to 5 years in the new State." 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982).

would conform to the explicit Congressional intent to facilitate such service to the State of New Jersey" (Pet. App. 21a n.2).[2]

The Commission recognized that in permitting RKO to invoke Section 331 and receive a license for a New Jersey station on Channel 9, it was taking an action with adverse effects on Multi-State's application to operate on that channel in New York City. The Commission believed, however, that this was Congress's clear intent. In the Commission's view, the statutory language ordering reallocation and issuance of a license "notwithstanding any other provision of law," "include[d] those statutory and regulatory provisions pertaining to comparative proceedings." Pet. App. 24a.

Moreover, it was apparent to the Commission that Congress was specifically aware that the statute would apply to RKO and that it would affect competing applicants for Channel 9. In a letter to the Chairman of the House Energy and Commerce Committee, which was then considering a bill with the same language as that ultimately contained in Section 331, the Chairman of the Commission said that under the proposed legislation " '[t]he Commission would be required to grant the renewal application of the VHF licensee in question without considering other public interest factors long used in making such a decision * * *. [C]ompeting applications for the licensee's facilities would be dismissed without comparison of the qualifications of the new applicant(s) vis-a-vis those of the incumbent licensee.' " Pet. App. 26a. In addition, Multi-State had written

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[2]The Commission also observed that when RKO submitted its notification proposing to move to New Jersey, it still qualified as a licensee under the Communications Act of 1934 and the Administrative Procedure Act (see 47 U.S.C. 307(c), 331; 5 U.S.C. 558(c)) because, as a result of the court's remand, its renewal application was still pending before the agency. Pet. App. 22a.

to 22 Congressmen and Senators, stating: " '[Multi-State's] 'protected status' is well established by FCC regulations and recognized by the Commission in all its proceedings. The Bradley amendment * * * disregards this recognized right of Multi-State and will totally destroy the longstanding equity of our protected position.' " Pet. App. 27a. Under these circumstances, the Commission viewed the law as a congressional determination that the interests of competing applicants must be subordinate to the objective of securing a commercial VHF station for New Jersey. Pet. App. 27a. Accordingly, the Commission reallocated Channel 9 to Secaucus; granted RKO a five-year license to operate the station; and, in a companion decision, dismissed as moot the renewal application of RKO and the competing application of Multi-State for Channel 9 in New York City (Pet. App. 39a-44a).

3. The court of appeals affirmed (Pet. App. 2a-16a). The court rejected Multi-State's argument that Section 331 did not apply to New Jersey. After thoroughly reviewing the history of television service in New Jersey and the legislative history of Section 331, the court concluded that "[t]he conference report, viewed against the backdrop of five years of legislative efforts by New Jersey Congressmen to secure a VHF station for their state, reveals that the purpose of section 331 is to provide each 'unserved' state with an *operating* VHF commercial television station" (Pet. App. 11a) (emphasis in original). The court also determined that the Commission properly carried out its function in reallocating Channel 9 to New Jersey and granting RKO a license for that channel. The court agreed with the Commission that Section 331 "displaced the normal procedures for channel reallocation * * * [and] for issuing licenses, including the requirement of a comparative hearing" (Pet. App. 12a-13a (footnote omitted)).

Finally, the court rejected Multi-State's contention that the Commission's action violated its constitutional right to due process. The court noted that Multi-State's right to a

hearing under *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327 (1945), stemmed from a statutory scheme that was altered by the enactment of Section 331. In light of Congress's "paramount power in the regulatory field" (Pet. App. 14a), the court found "[S]ection 331 to be permissible regulation of future action: it directs the Commission, under specified and limited circumstances, to reallocate a VHF channel and issue a license for that channel." The court noted (Pet. App. 14a-15a n.12) that

> licensees of broadcasting stations acquire no prescriptive right against the subsequent exercise of congressional power under the commerce clause to delete their station to achieve fair geographical distribution of broadcast service. Federal Radio Comm'n v. Nelson Brothers Bond and Mtge. Co., 289 U.S. 266, 282 (1933). *A fortiori*, the mere expectations of a license applicant cannot bar the legitimate exercise of such congressional power.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Moreover, this case involves the interpretation of a statute that, as the court of appeals recognized, applies only in a "limited context" (Pet. App. 14a).[3] There is thus no question presented warranting this Court's review.

1. The court of appeals and the Commission correctly concluded that the legislative history of Section 331 demonstrate "beyond cavil" (Pet. App. 10a) that Section 331 was intended to apply to New Jersey. In addition to frequent

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[3]The statute applies when a VHF licensee agrees to the reallocation of its channel to a state that does not have a commercial VHF station. At the time the statute was adopted, New Jersey and Delaware were the only states in that category and at the present time Delaware is the only state without an operating commercial VHF station.

specific references to New Jersey by the statute's sponsor, Senator Bradley, and other supporters (see Pet. App. 8a-11a), the Conference Report expressly stated that "New Jersey and Delaware are the only two States that do not have a commercial VHF television station * * *. This provision will remove impediments which currently discourage a licensee in a State which has more than one VHF television station from voluntarily moving to a State which has none." H.R. Conf. Rep. 97-760, 97th Cong., 2d Sess. 690 (1982).

Petitioner nevertheless argues that the language of the statute, which refers to states "in which there is allocated no very high frequency commercial television broadcast channel," is plain on its face and forbids resort to the legislative history. Petitioner argues that a commercial VHF station is "allocated" to a state if such a station is "assigned" to the state in the Commission's Table of Assignments, 47 C.F.R. 73.606. Petitioner notes that the Table assigns a VHF channel to Newark and does not prohibit that channel from being used for commercial purposes. Petitioner then assumes that Congress intended the phrase "very high frequency commercial television broadcast channel" in Section 331 to refer to any channel not reserved exclusively for noncommercial broadcast stations (Pet. 9-10). Petitioner's argument is without merit.

The language of Section 331 does not refer to the Commission's Table of Assignments. The statute refers to a state having no "allocated" VHF channel. The technical term that the Commission has traditionally used for "the process of designating a particular television channel to a particular city or area" is "assignment," not "allocation." *Table of Television Channel Allotments*, 83 F.C.C. 2d 51, 51 n.1 (1980). The Table of Assignments, moreover, nowhere contains the statutory phrase "commercial television broadcast channel" that appears in 47 U.S.C. 331. Although the Table indicates that certain channels are not reserved exclusively

for noncommercial use, the Commission has indicated that it would be incorrect to define such a channel as a commercial channel. *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 8 Rad. Reg. (P & F) 467, 469-470 (1952) ("While it has been convenient to refer to unreserved channels as 'commercial,' they are not in fact 'commercial' channels. The unreserved channels may be used commercially, or non-commercially, as the licensee sees fit.").[4]

Apart from the fact that the language of Section 331 is far from "plain," petitioner's argument misapprehends the "plain-meaning" rule. This Court has recently repeated Justice Frankfurter's warning that " '[t]he notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.' " *FBI* v. *Abramson*, 456 U.S. 615, 625 n.7 (1982), quoting *NLRB* v. *Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part).[5] As the court of appeals properly concluded, petitioner's construction of the statute "would ignore congressional intent and thwart the legislative will" (Pet. App. 11a (citation omitted)).[6]

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[4]Channel 13, which the Table assigns to Newark, is an example of an unreserved channel that has been operating noncommercially. See page 2, *supra*.

[5]"[T]he plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981), quoting *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928).

[6]The decisions relied upon by petitioner (Pet. 12-16) do not require that judges read statutory language in a vacuum and close their eyes to legislative history. In *TVA* v. *Hill*, 437 U.S. 153, 174-184 (1978); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); and *Howe* v. *Smith*, 452 U.S. 473, 483-485 (1981), for instance, this Court reviewed the legislative history of the statutes at issue and found that the legislative history conformed to the literal meaning of the statutes. And in *Badaracco* v. *Commissioner*, No. 82-1453 (Jan. 17, 1984), the Court did not even

2. Contrary to petitioner's contention (Pet. 18), the right to a hearing on an application for a television license is not a "protected property interest" "rooted in the Constitution." As the Court has stated (*Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)):

> Property interests * * * are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law * * *.

The cases cited by Multi-State (Pet. 18-19) are procedural due process cases that stand for the proposition that, when a protected property interest exists, certain due process procedures must be observed before an individual can be deprived of that property interest. Those cases do not, however, limit Congress's power to change the nature of a regulatory scheme. See *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982). See also *Goss* v. *Lopez*, 419 U.S. 565, 572-574 (1975); *Bell* v. *Burson*, 402 U.S. 535, 539 (1971).

Any property interests enjoyed by petitioner must stem from the Communications Act of 1934, not the Constitution. But under that Act, even a broadcast license confers no property right. 47 U.S.C. 301. "No licensee obtains any vested interest in any frequency." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 331 (1945) (footnote omitted). It is recognized, for example, that Congress has the power under the Commerce Clause to delete existing channels to achieve a fair geographical distribution of broadcast service. *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage*

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address the issue of the extent to which the courts may consider legislative history when construing a statute. Here, in contrast, the meaning ascribed to Section 331 by Multi-State is not only far from plain; it is at odds with the explicit purposes of the statute as enunciated in the legislative history.

Co., 289 U.S. 266, 282 (1933). *A fortiori*, the mere expectation of an applicant cannot bar the legitimate exercise of such congressional power. The right to a comparative hearing upon the filing of mutually exclusive applications is simply a "statutory right * * * which Congress has accorded applicants before denial of their applications." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. at 330. While petitioner had "the right to avail [itself] of the application route in an effort to perfect an interest to the extent that this was not precluded by law" (*Krueger* v. *Morton*, 539 F.2d 235, 238 (D.C. Cir. 1976)), nothing prevents Congress from changing the method of awarding licenses in order to foster reallocation of VHF channels to unserved states.

Petitioner erroneously asserts that Section 331 is unconstitutionally retroactive (Pet. 20-21). A retroactive statute imposes "unexpected liability for past, completed acts that were legally proper" when performed. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Section 331 did not impose liability for past acts; instead it operated prospectively by directing the Commission, under specified circumstances, to reallocate a frequency and issue a license for that frequency. See Pet. App. 14a. In the regulatory field, Congress has "paramount" power to alter the future rights of parties. *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958). As the Court there held (358 U.S. at 91), "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." See *New York Central R.R.* v. *White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."). In this case, Congress properly exercised its authority to change the governing rules of law in order to achieve its clearly-stated objective of improving television service in states, such as New Jersey, that lacked commercial VHF stations.

Finally, there is no merit to petitioner's equal protection claim (Pet. 21-22). The fact that the statute will rarely be invoked and that not every licensee will have the same incentive as RKO does not mean that the statute "was designed not only to save RKO General from the loss of Channel 9" or "to target and destroy" petitioner (Pet. 22). Section 331 was designed to further the legitimate objective of providing every state with an operating commercial VHF station (Pet. App. 11a). The congressional approach — offering an incentive to existing licensees to come forward and agree to a relocation — is rationally related to this objective. No more is required. *Hodel* v. *Indiana*, 452 U.S. 314, 331 (1981).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JACK D. SMITH
General Counsel

DANIEL M. ARMSTRONG
Associate General Counsel

SUE ANN PRESKILL
Counsel
Federal Communications Commission

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MULTI-STATE COMMUNICATIONS, INC.,
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v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph M. Morrissey*
Robert T. Murphy
WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 822-6900

Counsel for Petitioner
Multi-State Communications, Inc.

*Counsel of Record

October 19, 1984

THE CASILLAS PRESS INC - 1717 K Street NW Washington DC - 223-1220

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IN THE

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MULTI-STATE COMMUNICATIONS, INC.,
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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Comes now Multi-State Communications, Inc. (Multi-State), petitioner in the above-entitled proceeding, and pursuant to the provisions of Rule 16.6 of the Rules of the Supreme Court of the United States, respectfully submits this Supplement to its Petition For Writ Of Certiorari filed on August 6, 1984. As shown below the facts reported in this Supplement were not available at that time.

A. Status At The Time Of Filing Of Petition For Writ Of Certiorari

A detailed summary of the pertinent facts of record will be found in the Multi-State petition for writ of certiorari

filed on August 6, 1984. Briefly, the Federal Communications Commission, claiming it was acting pursuant to new Section 331 of the Communications Act of 1934, as amended, permitted RKO General, Inc. (RKO), a heretofore disqualified broadcast licensee, to reallocate its television channel (Channel 9) to New Jersey from New York and granted it a five-year license *without ever determining RKO's qualifications to be a broadcast licensee.* At the same time, the Federal Communications Commission summarily dismissed the challenging application of Multi-State which has been prosecuted for twelve years.

Multi-State contended (1) that the language of the new Section 331 did not authorize the transfer of the station and the granting of a five-year license to RKO and (b) the summary dismissal of the Multi-State application without a hearing to determine the qualifications of RKO to be a licensee violated public policy and deprived Multi-State of its right to due process under the Fifth Amendment.

At the time of the reallocation, grant of the five-year license to RKO and the dismissal of the Multi-State application, RKO was the subject of a Federal Communications Commission hearing[1] to determine whether RKO was qualified to be a licensee in view, *inter alia,* of its proven lack of candor in dealing with the Commission,[2] serious allegations of filing false and misleading financial reports with the Commission and allegations that RKO had misled the Commission or was lacking in candor in providing de-

[1] *RKO General, Inc. (KHJ-TV),* Docket No. 16679, et al.

[2] *RKO General* v. *FCC,* 670 F.2d 215 (C.A.D.C. Cir. 1981). The Federal Communications Commission found RKO to be disqualified in Boston (WNAC), New York (WOR-TV) and Los Angeles (KHJ-TV). The Court of Appeals upheld the Boston disqualification but remanded New York and Los Angeles to the Commission for a "principled explanation" of this disqualification. It was during this period that the new Section 331 of the Communications Act was enacted.

tails of Internal Revenue Service investigations. This hearing involves challenges to the renewal of the licenses of fourteen RKO broadcast facilities including KHJ-TV in Los Angeles.

B. Developments After The Filing Of The Petition For Writ Of Certiorari

1. RKO'S $7.9 MILLION OVERCHARGE

On August 13, 1984, subsequent to the filing of the Multi-State petition, RKO filed a twenty-page Report with the Federal Communications Commission which Report is part of the basis for this Supplement.

In this Report, RKO acknowledged that, for the period December 1, 1982, through May 31, 1984, RKO, through its wholly-owned subsidiary, RKO Radio Networks, Inc. (Networks), had overcharged its advertisers and underpaid its affiliates approximately $5.9 million.

In previous incorrect reports filed with the Federal Communications Commission on June 26, 1984, and June 28, 1984, RKO acknowledged only $4.0 million in overcharges and underpayments.

On September 28, 1984, in a statement filed with the Federal Communications Commission, RKO stated that the correct figure was $7,900,000.00 in overcharges and $300,000.00 in underpayments.[3]

Based on the earlier incorrect estimates of RKO, a request was made by Fidelity Television, Inc., one of the applicants in Docket 16679 mentioned above, for the desig-

[3]On October 12, 1984 RKO acknowledged to the Commission that the Securities and Exchange Commission was investigating the overcharge matter.

nation against RKO of a fraudulent billing issue. That request for a fraudulent billing issue was supported, on August 13, 1984, by the Mass Media Bureau of the Federal Communications Commission wherein the Bureau stated:

> "The Mass Media Bureau agrees with Fidelity that the misconduct disclosed by RKO raises serious questions regarding RKO's qualifications *that should be explored in a hearing.*" (Emphasis supplied).

Additionally, the RKO Report notes that Networks, the RKO subsidiary had, as its president, from 1979 through 1984, an individual named Thomas Burchill. RKO, on page 17 of its Report, admits to an assertion by Burchill that top executives of RKO, including Robert Williamson and John Fitzgerald, RKO General's Comptroller, were "aware of the practices in question."

In its Report RKO does not deny this allegation although it makes the self-serving statement that it is "aware of no evidence suggesting that any person employed by RKO General participated in the practices giving rise to overcharges to advertisers."

2. DESTRUCTION BY RKO OF ITS INTERNAL AUDIT REPORT[4]

On August 26, 1984, after resisting disclosure for many months, RKO, under an Order from the FCC Administrative Law Judge in the RKO KHJ-TV (Los Angeles) case, turned over the Arthur Young Report to Fidelity Television, Inc. (the challenger in the KHJ case). The Arthur Young Report contains dramatic disclosures that have the

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[4]The 1974 Internal Audit Report relates to matters of trade and barter that were the subject of some of the issues designated against RKO in the current *KHJ, et al.*, hearing at the Commission.

most serious possible consequences for RKO's qualifications to remain a Commission licensee. Briefly, the Arthur Young Report states that RKO's senior management denied the existence of, but had ordered the destruction of all copies of the RKO 1974 internal audit report of trade and barter at the New York stations because RKO management believed that the documents, if disclosed, would jeopardize RKO in its pending license renewal proceeding before the Commission. After being told by RKO that no copies of the document had been retained, Arthur Young, quite by accident, discovered a copy buried in an apparently unrelated file.

Based on the material in the Arthur Young Report, Fidelity, on September 4, 1984, filed with the Federal Communications Commission a Motion To Enlarge Issues based on the Arthur Young Report. The issues requested are as follows:

(1) whether RKO "sought to destroy the 1974 internal audit report to prevent its coming to the Commission's attention;

(2) "whether John B. Fitzgerald made misrepresentations and/or lacked candor in his March 1984 deposition testimony concerning whether any documents relating to RKO trade and barter had been destroyed; and

(3) "the facts and circumstances of the Special Review Committee's failure to disclose in its Report its findings concerning RKO's effort to destroy the 1974 internal audit report."

After the filing of the Fidelity Motion To Enlarge, RKO moved, on September 12, 1984, to extend the time for filing its response for almost two months (to November 13, 1984). On September 18, 1984, the Administrative Law

Judge or[illegible] 'KO to file its response no later than Septemb[illegible].

In its response RKO noted, in an almost unprecedented manner, that *it would not oppose the addition of the first issue requested relating to RKO's destruction of the 1974 internal audit report to prevent its coming to the Commission's attention.*[5]

SUMMARY

In its Petition For A Writ Of Certiorari, Multi-State noted (at p. 17) that Section 309 of the Communications Act (47 U.S.C. Sec. 309) as construed in this Court's landmark decision in *Ashbacker Radio Corp.* v. *FCC,* 32 U.S. 327, 66 S.Ct. 148, 90 L.Ed. 108 (1945), mandates a full comparative hearing in every case involving mutually exclusive applicants for a broadcasting license. Multi-State also noted that in license renewal cases (as in the instant case) "the FCC is required to make an affirmative finding that the public interest will be served by granting the license." *West Coast Media, Inc.* v. *FCC,* 695 F.2d 617 at 622 (D.C. Cir. 1982).

As noted above, RKO is and was the subject of a Federal Communications Commission hearing to determine its qualifications as a licensee. The original allegations are substantial and well supported. At the time of the filing of Multi-State's Petition For Writ Of Certiorari, a most unusual enigma existed. The Federal Communications Commission was probing serious charges as to RKO's qualifications to be a licensee of fourteen different broadcast stations. At the same time, under cover of a questionable intepretation of a new Section of the Communications Act

[5]On October 11, 1984 the Administrative Law Judge designated the requested issues against RKO and ordered a hearing on the matters.

(Section 331), the Commission was permitting RKO to move its New York station to New Jersey and granting RKO a five-year license *without ever determining the qualifications of RKO to be a licensee* in direct contravention of the requirements of *Ashbacker* and *West Coast Media, Inc., supra.*

The enigma is further exacerbated by the acknowledgement of RKO that *at the same time it was embarking on its new five-year license* it was engaged in serious overbilling of its advertisers and underpaying of its affiliates. Significantly, RKO has not denied that its Comptroller, John Fitzgerald, was aware of these illegal practices and it is the same John Fitzgerald who is at the core of the earlier financial issue designated by the Commission itself relating to false and misleading financial reports.

Even as RKO was embarking on the questionable five-year license term, it was revealed that an independent and respectable accounting firm had discovered that executives of RKO had ordered the destruction of certain material in fear that if these records were presented to the Commission the RKO license renewals would be in jeopardy. And, again, Mr. John Fitzgerald was at the core of the matter.

The effect of these new facts upon the Commission's decision is or should be palpably significant and proximate. That a full hearing should be granted in such circumstances is a minimal proposition. *W.S. Butterfield Theatres* v. *FCC,* 237 F.2d 552 n. 10 at 556 (D.C. Cir. 1956).

The express terms of new Section 331 do not confer upon RKO the exclusive privilege of retaining its broadcast rights to Channel 9 without the full examination in hearing of its qualifications consistent with the basic law and public policy of the United States which has long gov-

erned the grant of such privileges. *Ashbacker Radio Corp.* v. *FCC,* and *West Coast Media, Inc.* v. *FCC, supra.*

When requesting reallocation of its license to New Jersey and a new five-year license, RKO perpetrated a fraud on the Commission by concealing the $7.9 million overcharge and the intentional destruction of its 1974 records.[6] As noted in *Massachusetts Bay Telecasters* v. *FCC,* 261 F.2d 55 at 61 (D.C. Cir. 1955):

> ". . . misrepresentation and concealment of important and relevant information should be received and should be given substantial weight. . . ."

As noted, *supra,* in requesting reallocation of its license to New Jersey, RKO continued to deceive the Commission by concealing the $7.9 million overcharge and the intentional destruction of the pertinent 1974 records.

If RKO had provided the Commission with the 1974 internal audit report as it should have and had the Commission been aware of the 1982-1984 overbilling, it, the Commission, would scarcely have granted RKO a new five-year license. RKO stands to profit because of its unlawful concealment and destruction of pertinent records.

Elementary concepts of public interest and justice dictate that RKO's qualifications to retain Channel 9 in New York be publicly examined in a full and fair hearing (as is being done with fourteen other RKO stations) in which Multi-State, as a competing applicant, is permitted to participate.

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[6]It should be noted that a substantial amount of the overbilling and the trade and barter questions in the records attempted to be concealed from the Commission relate to the RKO station in New York.

Multi-State, in its Petition For Writ Of Certiorari demonstrated that the new Section 331, if correctly interpreted, could not permit the Commission to reallocate Channel 9, and RKO, the licensee, to New Jersey. Additionally, Multi-State maintains that failure of the Commission to hold a full hearing involving RKO and Multi-State deprived Multi-State of due process. The information in this Supplement more forcefully illustrates the need for a full comparative hearing.

CONCLUSION

Multi-State respectfully suggests several alternatives are available. These are: grant of the Petition For Writ Of Certiorari for the reasons enumerated and expanded upon in this Supplement; remand of the case for a full determination of RKO's qualifications to be a broadcast licensee or defer all action on the Petition For Writ Of Certiorari until the proceedings presently underway resolve the qualifications of RKO to be a broadcast licensee.

Respectfully submitted,

Joseph M. Morrissey*
Robert T. Murphy

WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 822-6900

Counsel for Petitioner
Multi-State Communications, Inc.

*Counsel of Record

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Office - Supreme Court, U.S.
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No. 84-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT RKO GENERAL, INC.

J. ROGER WOLLENBERG *
JOEL ROSENBLOOM
TILLMAN L. LAY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

HAROLD DAVID COHEN
WILLIAM H. FITZ
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Counsel for Respondent RKO General, Inc.

October 19, 1984

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

Pursuant to Section 331 of the Communications Act of 1934, as amended, the Federal Communications Commission reallocated VHF Channel 9 from New York City to Secaucus, New Jersey and issued a license for that frequency to RKO General, Inc.,* the existing licensee of VHF Channel 9 in New York. The Commission also dismissed as moot pending comparative hearing proceedings for VHF Channel 9 in New York. The petition raises two issues:

1. Whether the Court of Appeals erred in construing Section 331 of the Communications Act to require the actions taken by the Commission.

2. Whether the Court of Appeals erred in concluding that the Commission's application of Section 331 of the Communications Act did not violate the Due Process Clause of the Fifth Amendment.

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* The parent company of RKO General, Inc. is Gencorp, Inc. Frontier Holdings, Inc., is the only partially owned subsidiary of RKO General, Inc. For purposes of Rule 28.1 of the Rules of this Court, we construe the term "affiliate" to exclude other subsidiaries of the parent company of RKO General, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-215

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT RKO GENERAL, INC.

Respondent RKO General, Inc. (Intervenor below) submits this brief in opposition to the petition for writ of certiorari filed by petitioner Multi-State Communications, Inc. ("Multi-State").[1]

STATEMENT

Petitioner seeks review of a decision by the United States Court of Appeals for the District of Columbia Cir-

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[1] Citations to "Pet. App. ——a" refer to appendices to the Petition for Writ of Certiorari filed by petitioner Multi-State Communications, Inc.

cuit affirming two orders of respondent Federal Communications Commission ("the Commission") pursuant to which the Commission (1) reallocated VHF Channel 9 from New York City to Secaucus, New Jersey, (2) granted respondent RKO General, Inc. ("RKO"), the then-existing licensee of Channel 9 in New York, a five-year broadcast license for the reallocated channel, and (3) dismissed as moot both the renewal application of RKO and the competing application of Multi-State to broadcast on Channel 9, New York. The orders were issued pursuant to Section 331 of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 331 (1982), a provision adopted on September 3, 1982.

The following is intended to supplement the Statement of respondent Commission in ways we believe will aid the Court in the disposition of this Petition.

A. The License Renewal Proceeding

Respondent RKO owns and operates a number of television and radio stations throughout the country. Among its stations is WOR-TV, which operates on the channel at issue in these proceedings. Continuously from 1952 until the issuance of the Commission orders in question here, RKO was the licensee of VHF Channel 9 in New York City and operated WOR-TV on that channel as a commercial television station. Since that time, RKO has been the licensee of WOR-TV on VHF Channel 9 in Secaucus, New Jersey.

In 1972, RKO filed an application to renew its license to operate WOR-TV. Multi-State thereafter filed a competing application seeking a permit to construct and operate a new television station on the same channel in New York City. Because the applications were mutually exclusive, the Commission consolidated them and ordered a comparative hearing.[2] Several qualification issues desig-

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[2] *RKO General, Inc. (WOR-TV)*, 46 F.C.C.2d 246 (1974).

nated for hearing in the New York proceeding were identical to ones already designated against RKO in a pending license renewal proceeding involving RKO's renewal application for station WNAC-TV, Channel 7, in Boston, Massachusetts.[3]

In June 1980, the Commission issued a decision in the Boston proceeding in which it found that RKO lacked the requisite character qualifications for renewal of its license for WNAC-TV.[4] Based on its findings in the Boston proceeding, and without further hearing, the Commission simultaneously denied renewal of RKO's license for Channel 9 in New York.[5] On December 4, 1981, the Court of Appeals affirmed the Commission's decision with respect to the Boston proceeding on a single ground which it held was not automatically applicable to other RKO licenses.[6] Accordingly, it remanded for further proceedings the Commission's decision regarding RKO's license renewal for Channel 9 in New York.[7]

B. Efforts To Secure a Commercial VHF Station for New Jersey

While the WOR-TV litigation was pending, proceedings were taking place before the Commission to assess

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[3] *Id.* at 248-49. *See RKO General, Inc. (WNAC-TV)*, 20 F.C.C.2d 846 (1969); *RKO General, Inc. (WNAC-TV)*, 25 F.C.C.2d 633 (1970); *RKO General, Inc. (WNAC-TV)*, 30 F.C.C.2d 138 (1971).

[4] *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980), *modified*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

[5] *RKO General, Inc. (WOR-TV)*, 78 F.C.C.2d 357 (1980), *remanded*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

[6] *RKO General, Inc. v. FCC*, 670 F.2d 215, 218 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

[7] *Id.* at 237.

the adequacy of local commercial VHF broadcast service in New Jersey.[8] These proceedings were prompted by the dissatisfaction of New Jersey citizens with television coverage of local events—dissatisfaction which stemmed from the absence of an operating commercial VHF television station in New Jersey.[9] Although VHF Channel 13 ostensibly has been assigned to New Jersey and technically has been available for commercial use since 1952,[10] the Commission in 1961 approved the transfer of the license for that channel from a commercial operator in New Jersey to a noncommercial educational operator with studios and offices in New York.[11] As the Commission and the Court of Appeals found, the Channel 13 station has been operated noncommercially as part of the New York State educational network ever since that time.[12] Thus, there was no operating commercial VHF channel in New Jersey for more than twenty years.

The proceedings before the Commission concerning New Jersey's problem did not result in the assignment to New Jersey of an operating commercial VHF station.[13] Dissatisfied with this situation, New Jersey Congressmen

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[8] *See State of New Jersey Television Service, First Report and Order*, 58 F.C.C.2d 790 (1976), *supplemented, Second Report and Order*, 59 F.C.C.2d 1386 (1976), *supplemented, Third Report and Order*, 62 F.C.C.2d 604 (1976), *petition dismissed sub nom. New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119 (3d Cir. 1978).

[9] Pet. App. 7a.

[10] *See Television Assignments, Sixth Report and Order*, 41 F.C.C. 148, 258-59 (1952); 47 C.F.R. § 73.606(b) (1982).

[11] *NTA Television Broadcasting Corp.*, 44 F.C.C. 2563 (1961).

[12] Pet. App. 7a & 21a n.2.

[13] *See* note 8 *supra*.

introduced legislation designed to accomplish that purpose.[14]

On March 31, 1982, Senator Bradley of New Jersey introduced a bill identical in language to Section 331.[15] Referring to his State's need for a commercial VHF television station, Senator Bradley explained that the bill, "by direct[ing the Commission] to accept and grant the application of any current license holder who voluntarily requests to have its commercial VHF TV license moved to a State which does not have one," would solve "New Jersey's problem" if "a New York station owner will step forward to move to New Jersey." [16] The Sen-

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[14] Between April 1978 and July 1982 (when the bill that eventually became Section 331 was introduced), New Jersey Congressmen introduced seven bills designed to secure a commercial VHF station for their state. S.1629, Sen. Amendment No. 868, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 4961, Sen. Amendment No. 1124, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 2128, 97th Cong., 1st Sess. (1981) (Rep. Guarini, D-N.J.); S. 1377, Amendment No. 202, 97th Cong., 1st Sess. (1981) (Sen. Bradley, D-N.J.); H.R. 7311, 96th Cong., 2d Sess. (1980) (Rep. Maguire, D-N.J.); H.R. 11,936, 95th Cong., 2d Sess. (1978) (Rep. Maguire, D-N.J.); S.2853, 95th Cong., 2d Sess. (1978) (Sen. Case, R-N.J. & Sen. Williams, D-N.J.). The legislative history of these bills is replete with statements clearly showing that they were intended to provide New Jersey with a commercial VHF station. *See, e.g.*, 124 Cong. Rec. 9163-64 (1978) (remarks of Rep. Maguire); *id.* at 9011 (remarks of Sen. Case); *Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce on H.R. 13015*, 95th Cong., 2d Sess., Vol. V, Pt. 2, at 212-51 (1978); H.R. Rep. No. 1352, 96th Cong., 2d Sess. (1980); H.R. Rep. No. 1438, 96th Cong., 2d Sess. (1980).

[15] 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982). As the Court of Appeals found, Senator Bradley was aware at the time he introduced his bill that RKO had earlier announced its willingness to move from New York to New Jersey if it were issued a new license there for Channel 9. Pet. App. 8a n.6.

[16] 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982).

ate adopted Senator Bradley's bill, but the bill to which it was appended did not become law.[17]

Senator Bradley reintroduced the same bill on July 22, 1982.[18] The bill once again passed the Senate, was added as an amendment to the Tax Equity and Fiscal Responsibility Act of 1982, and was referred to a conference committee.[19] In its report retaining the Bradley amendment, the conference committee explicitly recognized that "New Jersey and Delaware are the only two States that do not have a commercial VHF station" and stated that the Bradley amendment was designed to implement "congressional intent that it is in the public interest for every State to have at least one VHF television station."[20] The conference committee further stated that the amendment implemented the intent of Congress by removing existing impediments that discouraged a licensee from voluntarily moving to a state which had no commercial VHF station.[21] The Bradley amendment became law on September 3, 1982.[22]

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[17] Pet. App. 10a.

[18] 128 Cong. Rec. at S8922 (daily ed. July 22, 1982).

[19] Pet. App. 9a. As the Court of Appeals noted, each conference committee member received a letter from eight Congressmen urging retention of the Bradley provision and stating that the effect of the provision "'is that WOR-TV in New York will be able to move to New Jersey and have its license reallocated there.'" Pet. App. 9a n.8 (citation omitted).

[20] H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982).

[21] *Id.*

[22] Section 331 provides:

> It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if

C. The Commission Decision

On September 7, 1982, RKO informed the Commission that, pursuant to the newly-enacted Section 331, it agreed to the reallocation of VHF Channel 9 from New York City to Secaucus, New Jersey upon the issuance by the Commission of a five-year license to RKO. Upon review of the language and the legislative history of Section 331, the Commission determined that RKO's agreement to reallocation of VHF Channel 9 from New York to New Jersey fell within the meaning of Section 331 and that the statute, by requiring the Commission upon notification to reallocate the existing licensee's channel and to issue a license to that licensee "notwithstanding any other provision of law," displaced the normal statutory and regulatory provisions relating to comparative hearings and the issuance of licenses.[23] Accordingly, the Commission ordered the reallocation of VHF Channel 9 from New York City to Secaucus, New Jersey and granted RKO a five-year license for that channel.[24] In a companion order, the Commission dismissed as moot the pending applications of RKO and Multi-State for VHF Channel 9 in New York City.[25]

> technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of [the Communications Act of 1934].

47 U.S.C. § 331 (1982).

[23] Pet. App. 24a.

[24] Pet. App. 29a.

[25] Pet. App. 39a.

D. The Court of Appeals Decision

Multi-State appealed the Commission's Decision and Orders to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the Commission's orders in a unanimous opinion.[26] Rejecting Multi-State's contention that the Commission had misconstrued Section 331 to apply to New Jersey, the Court of Appeals found it clear "beyond cavil that Congress intended section 331 to apply to New Jersey."[27] The court reached that judgment on the basis of a thorough examination of both the language and the legislative history of Section 331.[28] It concluded that "[t]he conference [committee] report, viewed against the backdrop of five years of legislative efforts by New Jersey Congressmen to secure a VHF station for their state, reveals that the purpose of section 331 is to provide each 'unserved' state with an *operating* VHF commercial television station."[29] Relying on this Court's precedent,[30] the Court of Appeals held that Multi-State's interpretation of Section 331 was untenable because it would thwart the clear intent of Congress and that the Commission had correctly construed Section 331 to apply to the reallocation of VHF Channel 9 from New York to New Jersey.[31]

The Court of Appeals also held that the Commission's application of Section 331 in a manner which mooted the

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[26] Pet. App. 2a.

[27] Pet. App. 10a.

[28] Pet. App. 7a-11a.

[29] Pet. App. 11a (emphasis in original).

[30] Pet. App. 7a, 11a & 15a (citing *FBI v. Abramson*, 456 U.S. 615 (1982), *Philbrook v. Glodgett*, 421 U.S. 707 (1975), and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979)).

[31] Pet. App. 11a. The Court of Appeals also rejected Multi-State's contention that RKO was not a "licensee" within the meaning of Section 331. Pet. App. 11a-13a. Multi-State has not raised this issue in its petition.

pending comparative hearing proceedings involving Multi-State's license application for VHF Channel 9 in New York did not deprive Multi-State of due process. Rejecting Multi-State's contention that it had been unconstitutionally divested of its right to a comparative hearing under *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945), the court noted that the *Ashbacker* decision conferred upon license applicants not a constitutional right, but instead a statutory right to a hearing.[32] The court reasoned further that, in enacting Section 331, Congress created a "limited exception" to the general hearing mechanisms contained in the Communications Act "to achieve the overriding objective of bringing an operational VHF commercial television station to unserved states such as New Jersey and Delaware." [33] Relying on established precedent,[34] the court then concluded that, based upon the "paramount power [of Congress] in the regulatory field," Section 331 is a "permissible regulation of future action" directing "the Commission, under specified and limited circumstances, to reallocate a VHF channel and issue a license for that channel." [35]

Multi-State filed a petition for rehearing and suggestion for rehearing *en banc*, urging essentially the same arguments now made in its petition for certiorari. On May 7, 1984, the Court of Appeals denied without opinion Multi-State's petition for rehearing. Pet. App. 47a-49a.

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[32] Pet. App. 14a (citing *Ashbacker Radio Co. v. FCC*, 326 U.S. at 333).

[33] Pet. App. 14a.

[34] *See, e.g., F.H.A. v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Fleming v. Nestor*, 363 U.S. 603 (1960); *Fleming v. Rhodes*, 331 U.S. 100 (1947); *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co.*, 289 U.S. 266 (1933); *McCullough v. Virginia*, 172 U.S. 102 (1898).

[35] Pet. App. 14a.

ARGUMENT

This case does not merit review. The decision below presents none of the established grounds for exercise of this Court's certiorari jurisdiction and, in any event, is plainly correct.

1. The decision below is not in conflict with the decisions of this Court or of any other court of appeals, and the court below did not depart from the accepted and usual course of judicial proceedings. Moreover, contrary to Multi-State's assertion that this case presents "significant" and important questions,[36] the decision presents no issues "of importance to the public as distinguished from [the interests] of the parties."[37] Rather, it involves the interpretation of a statute which, as the Court of Appeals recognized, applies only in certain specific and exceedingly limited circumstances.[38] Those circumstances are highly unlikely to recur and therefore do not warrant this Court's consideration.[39]

2. The decision below is clearly correct.

a. *The Court of Appeals correctly relied upon legislative history to construe Section 331 so as not to frustrate the clear intent of Congress.* The Court of Appeals properly recognized that "[c]onstruing a statutory term . . . requires more than a superficial and isolated examination of the statute's plain words. Ascertaining

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[36] Multi-State Petition ("Pet.") at 8-9.

[37] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

[38] As the court noted (and petitioner does not deny), Section 331 is quite limited in scope. It was intended to provide those states without an operating VHF commercial television station a mechanism to obtain one, and at the time the statute was enacted, only two states—New Jersey and Delaware—fell into that category. Pet. App. 9a-10a. Therefore, the statute at most could apply in only one other instance.

[39] *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

congressional intent requires us to examine 'the context in which statutory words are set—the statute's purpose, structure and history. . . .' " [40] In analyzing the purpose, structure and history of Section 331, the court noted that, at the time Section 331 was enacted, there had been no VHF channel in New Jersey operated as a commercial television station for more than twenty years.[41] It further found that efforts to secure such a station for New Jersey had been the driving force in the enactment of Section 331.[42] And the court correctly concluded that the legislative history of Section 331 leaves no doubt that Congress intended the statute to apply to New Jersey.[43] The Court of Appeals properly refused to adopt a construction of the statute which would frustrate its very purpose.[44]

Multi-State does not dispute the conclusion of the Commission and the court below that the legislative history and the circumstances surrounding the enactment of Section 331 unequivocally demonstrate that the statute was intended to apply to New Jersey.[45] Instead, Multi-State

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[40] Pet. App. 7a (quoting *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761 (D.C. Cir. 1984) and citing *FBI v. Abramson*, 456 U.S. 615, 625 & n.7 (1982)).

[41] Pet. App. 7a.

[42] Pet. App. 8a-11a.

[43] Pet. App. 7a-11a.

[44] Pet. App. 11a (citing *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)).

[45] Multi-State attempts to sidestep the problem by asserting that the legislative history of Section 331 is "scanty," with only "cursory reference" in the Conference Committee Report. Pet. at 5. The legislative history, as the Court of Appeals' opinion shows, is not nearly as scanty as Multi-State suggests. Moreover, Multi-State neglects to mention that the Conference Report—as well as the frequent remarks of the statute's sponsors and proponents, and Multi-State's own letter to twenty-two Congressmen urging rejection of the Bradley amendment—uniformly and explicitly recog-

argues that, based on the so-called plain-meaning rule of statutory construction, examination of the legislative history of Section 331 is forbidden because the statute's meaning is clear on its face.[46]

Multi-State's contention is specious. As an initial matter, it is far from "plain" that on its face Section 331 excludes New Jersey.[47] More fundamentally, however, Multi-State's argument rests on a gross distortion of the plain-meaning rule of statutory construction. Multi-State is in error in suggesting that decisions of this Court compel courts to refrain from examining legislative history when interpreting a statute.[48] On the contrary, this

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nized that New Jersey was intended to fall within the scope of Section 331. Pet. App. 7a-11a & 27a.

[46] Pet. at 11-16.

[47] To divine the supposedly "plain" meaning of the statute, Multi-State resorts to the Commission's Table of Assignments, which nowhere contains the phrase "commercial television broadcast channel," *see* 47 C.F.R. § 73.606 (1982), and posits, without support, that Congress intended the phrase "very high frequency commercial television broadcast channel" in the statute to have the precise, technical meaning of any channel in the Commission's Table of Assignments that is not reserved exclusively for noncommercial educational broadcast stations. Pet. at 9-10. Yet, as the Commission itself has noted, the phrase "commercial channel" has no such technical, unambiguous meaning because "unreserved channels [in the Commission's Table of Assignments] may be used commercially, or non-commercially, as the licensee sees fit." *Amendment to Section 3.606 of the Commission's Rules and Regulations, Memorandum Opinion and Order*, 8 Rad. Reg. 467, 469-70 (1952). Contrary to Multi-State's assertion, there is no basis for contending that Section 331, which sets forth the policy that "not less than one [very high frequency commercial television broadcast] channel shall be allocated to each state," means only that the Commission's Table of Assignments should include for each state at least one VHF channel that legally could have been used commercially, even though none is in fact so used.

[48] *See* Pet. at 12-16. The cases relied upon by Multi-State are not to the contrary. In *TVA v. Hill*, 437 U.S. 153, 174-84 (1978), *Rubin v. United States*, 449 U.S. 424, 430 (1981), and *Howe v. Smith*,

Court recently cautioned that "the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " [49]

The Court of Appeals found persuasive, indeed overwhelming evidence in the legislative history that the purpose of Section 331 was to provide unserved states such as New Jersey with an operating commercial VHF station. The decision to reject Multi-State's strained interpretation of the statute and to construe Section 331 in conformity with its clearly expressed purpose was eminently proper.[50]

b. *The Court of Appeals correctly held that Multi-State was not denied due process.* The court below properly found Section 331 to be a permissible exercise by Congress of its power under the Commerce Clause to alter the regulatory field to achieve a legitimate public purpose.[51] Its decision was grounded on established prec-

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452 U.S. 473, 483-85 (1981), for instance, this Court examined the legislative history of the statute in question and concluded that it was consistent with the Court's interpretation of the statute. In *Badaracco v. C.I.R.*, —— U.S. ——, 104 S. Ct. 756 (1984), relied on by Multi-State (Pet. at 16), the Court was not even faced with the question of whether courts properly may interpret a statute in light of its legislative history. Here, on the other hand, Multi-State's interpretation of Section 331 conflicts with the clearly expressed purpose of the statute as revealed in the legislative history.

[49] *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)). *See also FBI v. Abramson*, 456 U.S. 615, 625 & n.7 (1982).

[50] *See Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 2025 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute. . . .").

[51] Pet. App. 13a-15a.

edent demonstrating that the implementation of Section 331 deprived Multi-State of no cognizable vested right and was fully consistent with the requirements of due process.

Multi-State contends that the application of Section 331 by the Commission and the Court of Appeals to moot the comparative hearing proceedings for VHF Channel 9 in New York deprived it of its "antecedent right" to completion of the comparative hearing for that channel under *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945).[52] Multi-State further asserts that, by virtue of its continued participation in the comparative hearing, this "right" became a "protected property interest" which "became rooted in the Constitution."[53]

As the court below found, Multi-State's argument rests on a misreading of this Court's decision in *Ashbacker* and a misunderstanding of the broad powers of Congress to alter the statutory framework of regulation it has created. Contrary to Multi-State's assertion, the right of an applicant to compete in a comparative hearing under *Ashbacker* is not "rooted in the Constitution"; rather, it derives from a general statutory scheme which, under some circumstances, precludes denial of an application without a hearing.[54] But it does not follow, as Multi-State suggests, that this statutory right to a hearing may somehow be transformed into a right to continuation of a comparative hearing where, as here, the license sought (for Channel 9 in New York) is no longer available because the pertinent channel has been reallocated pursuant to the directive of Congress. Indeed, the law is clear that there is no right to a hearing for a channel that has been made unavailable by a valid

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[52] Pet. at 17-20.

[53] *Id.* at 18.

[54] *See Ashbacker Radio Co. v. FCC*, 326 U.S. at 330; 47 U.S.C. § 309(a) (1982).

Commission decision to remove a previously available frequency.[55] There can be no greater right to a hearing where, as here, Congress in Section 331 has required the Commission to make just such a decision.

In addition, the Act specifically denies existing licensees any ownership interest in the channels they use and any right to operate a station or to use a frequency beyond the terms of the license.[56] Thus, as this Court held more than fifty years ago, even existing licensees acquire no prescriptive right against the subsequent exercise of congressional power under the Commerce Clause to delete their stations in order to attain a fair distribution of broadcast service.[57] *A fortiori*, mere applicants such as Multi-State can have no such right.

Section 331 represents a limited alteration by Congress of the statutory framework governing the allocation of broadcast frequencies and the issuance of broadcast licenses.[58] Contrary to Multi-State's assertion, Section 331

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[55] *See, e.g., Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 344 (D.C. Cir. 1962); *Bendix Aviation Corp., Bendix Radio Division v. FCC*, 272 F.2d 533, 537 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 965 (1960); *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 26 (D.C. Cir. 1954) (upholding the Commission's television allocation plan under which "all applications for licenses not conforming to the over-all plan [were] automatically dismissed").

[56] 47 U.S.C. §§ 301 & 309(h) (1982).

[57] *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969) ("Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations.").

[58] The procedural due process cases cited by Multi-State—*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Vitek v. Jones*, 445 U.S. 480 (1980); *Barry v. Barchi*, 443 U.S. 55 (1979); *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)—are

is not retroactive legislation, and it was not applied retroactively to moot Multi-State's pending application.[59] Section 331 simply does not impose on Multi-State any "unexpected liability for past, completed acts that were legally proper" when performed.[60] Instead, as the Court of Appeals found, it merely regulates future action by directing the Commission, under certain limited circumstances, to reallocate a VHF channel and to issue a license on the reallocated channel to the existing license holder.[61] The Court of Appeals decision in this respect is not only quite narrow in scope; it is clearly correct.[62]

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inapposite. Pet. at 18-19. None of those cases concerned the scope of protected property interests in the context of rights previously acquired and subsequently altered pursuant to a congressionally enacted regulatory scheme. *See, e.g., F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 91 & n.6 (1958). Moreover, this Court has made clear that procedural due process applies only to the adequacy of procedural provisions governing the deprivation of protected property interests; it does not limit the legislature's power to adjust or even to terminate government programs or regulatory schemes. *See Logan v. Zimmerman Brush Co.*, 455 U.S. at 432-33. In the latter circumstance, "the legislative determination provides all the process that is due." *Id.* at 433. Section 331 represents just such a legislative determination.

[59] Pet. at 20-21.

[60] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

[61] Pet. App. 14a. *See also F.H.A. v. The Darlington, Inc.*, 358 U.S. at 91:

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

[62] Multi-State also asserts that the application of Section 331 to moot the pending application proceeding violated equal protection. Pet. at 21-22. The argument, which Multi-State failed to raise until its petition for rehearing in the Court of Appeals, is without merit. As this Court held in *Hodel v Indiana*, 452 U.S. 314, 331

CONCLUSION

For the foregoing reasons, and those stated in the Brief in Opposition for Respondent Federal Communications Commission, the petition for writ of certiorari should be denied.

Respectfully submitted,

J. ROGER WOLLENBERG *
JOEL ROSENBLOOM
TILLMAN L. LAY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

HAROLD DAVID COHEN
WILLIAM H. FITZ
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Counsel for Respondent
RKO General, Inc.

October 19, 1984

* Counsel of Record

(1981), "Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." Section 331 does not employ suspect classifications, nor does it impinge upon any fundamental right. Multi-State does not even mention, much less dispute, that Section 331, by providing an incentive for an existing licensee to step forward and relocate its station in a state previously unserved by a commercial VHF station, is rationally related to the legitimate objective of providing every state with an operating commercial VHF station. *See* Pet. App. 14a-15a.

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No. 84-215

IN THE

Supreme Court of the United States

October Term, 1984

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO OPPOSITION OF MULTI-STATE COMMUNICATIONS, INC.

Joseph M. Morrissey*
Robert T. Murphy

WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 822-6900

Counsel for Petitioner
Multi-State Communications, Inc.

*Counsel of Record

CASILLAS PRESS INC - 1717 K ST NW WASHINGTON DC - 223-1220

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REPLY TO OPPOSITION OF MULTI-STATE COMMUNICATIONS, INC.

Multi-State Communications, Inc. (Multi-State), petitioner in the above entitled proceeding, pursuant to the provisions of Rule 22.5 of the Rules of the Supreme Court of the United States, hereby respectfully submits its Reply to the Opposition filed on behalf of the Federal Communications Commission and the intervenor, RKO General.

I. JUDICIAL LEGISLATION

The decision of the Court below and the agency directly offend the rule of *Iselin* v. *United States,* 270 U.S. 245, 46 S.Ct. 248 (1926), and other decisions of the court and the circuits as set forth in our Petition (pp. 9-16).

The special emphasis and elaboration imposed on alleged legislative background and history by the Commission and RKO is compelling evidence that Section 331, by its plain terms does not authorize that which the Commission has erroneously done and which the Court below has condoned.

At the risk of repetition, the remarks of legislators or reports of committees, while interesting and perhaps instructive, are not to be accepted as the governing law and may not be made to supply that which has been omitted from the statute.[1]

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[1] The government seeks to suggest that "The legislative history made clear that the statute was intended to allow a licensee that volunteered to move to do so without having to face an immediate comparative hearing" (Brief for FCC in Opposition, pp. 3-4) by referring to remarks made by the sponsor of the bill, Senator Bradley. What the government fails to state, however, is that these remarks were made *after* not before passage and can hardly be correctly proferred as intent of any legislator other than Bradley. Moreover, there is no reference to the misleading statement of Senator Bradley, upon introduction of the bill that "this amendment . . . has been dealt with by the Senate . . . the last time by a vote of 86-4." 128 Cong. Rec. S.8922-23 (daily ed., July 22, 1982). A comparison of the previous amendment to which Senator Bradley made reference and the Section 331 amendment which he proferred clearly reveal fundamental differences. See 127 Cong. Rec. S.11135 (daily ed., October 6, 1981). These differences highlight the omission from Section 331 which the court below and the agency have supplied upon the basis of a selective recitation of background facts. A copy of the previous amendment is included in the appendix. Note that the earlier amendment refers to a State in which no very high frequency television broadcasting station *is operating commercially*. Section 331, however, fails to include "operating commercially."

Confronted by the rule of *Iselin* v. *United States, supra,* upon which we rely ("To supply omissions transcends the judicial function") and with which the decision below conflicts, the opposing parties simply and completely ignore it. It cannot be seriously questioned that courts may not revise an unambiguous statute to fit what it believes was the intent of the legislators.

A review of the labored reasoning of the opposing parties on this point only leads us to say not only that "even Homer nods" but in the words of this court in *United States* v. *Naftalin,* 441 U.S. 768, 773, 99 S.Ct. 2077, 2082:

> "The short answer is that Congress did not write the statute that way."

The government's tortured reasoning as to the allocation of a non-reserved VHF television station to New Jersey (Brief, for the FCC in Opposiiton, pp. 8-9) is not only confusing but also is obviously employed in an attempt to impeach the plain contradictory finding of the Commission itself in ft. n. 2, of its Report and Order in this very case (App. B., p. 21a) wherein the Commission conceded that:

> "An examination of the television allocation table (73.606(b) of the Commission's Rules) shows that Channel 13, a non-reserved, VHF television channel is allocated to New Jersey."

II. DUE PROCESS

Little needs to be added to that which we have set forth in our Petition.

The implications of this case has precedential potential far beyond the narrow reach contended for by the opposition. The critical factor which is side-stepped in both the

FCC and RKO briefs in opposition is the vigorous and expensive pursuit of an administrative application carried on in good faith, on every administrative and judicial level for more than 10 years, long antedating the enactment of Section 331 which neither recognizes nor explicitly deals with its pendency. The Commission's brief does not deign to reconcile its position herein with its administrative recognition that a competing application does achieve a monetary value and, thus, incumbent licensees are permitted to settle the competing claim on the channel with Commission approval.[2] This FCC practice is clearly consistent with the fact that our application, litigated and pressed for more than a decade, has evolved into a species of property entitled to all due process protections of the Fifth Amendment.

The FCC and RKO, allied in their opposition to this petition, have misstated our position when they contend that we claim that the right of any applicant to compete in a comparative hearing under *Ashbacker*[3] is rooted in the Constitution. (RKO Brief in Opp., pp. 14-15; Brief for the FCC in Opp., pp. 10-11). Rather, we clearly contend that such a right once exercised and pressed as long, diligently and expensively, as we have done, in reliance upon existing "rules of the road" thus becomes rooted in the Constitution and acquires constitutional parameters that must not be summarily brushed aside.

It is the difference between a 25-mile marathon race, run under Olympic rules, being cancelled before the competitors commence the race or being summarily cancelled after a competitor – near exhaustion – has the fin-

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[2] E.g., *Hampton Roads Television Corp.*, 46 RR 2d 1547 (1980).

[3] *Ashbacker* v. *FCC*, 316 U.S. 327, 66 S.Ct. 148 (1945).

ish line in sight and victory at hand. Fundamental concepts of due process distinguish the two caes.

This is a case, therefore, affected with a broad and important public interest.

CONCLUSION

The petition for a writ of certiorari or the alternate relief suggested should be granted.

Respectfully submitted,

Joseph M. Morrissey*
Robert T. Murphy

WELCH & MORGAN
300 Farragut Building
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 822-6900

Counsel for Petitioner
Multi-State Communications, Inc.

*Counsel of Record

October 26, 1984

APPENDIX

127 Cong. Rec. S.11135 (daily ed., October 6, 1981). That amendment to Section 307 of the Communications Act would have provided in new section (f):

> In order to carry out the intent of subsection (b) of this section, it shall be the policy of the Commission to assign channels for very high frequency television broadcasting in a manner which ensures that not less than one such channel shall be licensed to a commercial station located in each State, if technically feasible. If the Commission at any time on or after January 1, 1980, declines to renew, or revokes, the license of any very high frequency commercial television station whose authorized channel of operation is assigned to a State with more than one such assignment, it shall, if technically feasible, assign such channel to a State in which no very high frequency television broadcasting station is operating commercially.